16-629

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 7.

THE UNITED STATES, PLAINTIFF,

vs.

R. G. HARRIS ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED APRIL 19, 1878.

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SUPREME COURT OF THE UNITED STATES.

No. 7.

THE UNITED STATES, PLAINTIFF,

vs.

R. G. HARRIS ET AL.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED APRIL 12, 1878.

1 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its November term, A. D. 1876, at the United States court-house in the city of Memphis in said district on, to wit, the seventh day of December, A. D. 1876, in the following cause, to wit:

THE UNITED STATES, PLAINTIFFS,
vs.
R. G. HARRIS ET ALS., DEFENDANTS. } No. 1415. Indictment.

2 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit of the United States, November term, A. D. 1876.

The grand jurors of the United States within and for the western district of Tennessee, in the sixth judicial circuit of the United States, duly elected, empanneled, sworn, and charged to inquire within and for said district in said circuit, upon their oaths present that R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sydney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hugdins, Nathan Brown, W. A. Powel, John Hunt, William Best, William Crandal, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Collinworth, and S. W. Brassfield, yeomen, of the county of Crocket in the State of Tennessee, and all late of the county and district aforesaid, on, to wit, the fourteenth day of August, in the year of our Lord one thousand eight hundred and seventy-six, in the county of Crocket, in said State and district, and within the jurisdiction of this court, unlawfully, with force and arms, did conspire together and with certain other persons whose names are to the grand jurors aforesaid
3 unknown, then and there, for the purpose of depriving Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, then and there being citizens of the United States and of said State, of the equal protection of the laws in this, to wit, that theretofore, to wit, on the day and year aforesaid, in said county, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, having been charged with the commission of certain criminal offenses, the nature of which said criminal offenses being to the grand jurors aforesaid unknown, and having upon such charges then and there been duly arrested by the lawful and constituted authorities of said State, to wit, by one William A. Tucker, the said William A. Tucker then & and there being a deputy sheriff of said county, and then and there acting as such; and having been so arrested as aforesaid, and being then and there so under arrest and in the custody of said deputy sheriff as aforesaid, they, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, were there and then by the laws of said State entitled to the due and equal protection of the laws thereof, and were then and there entitled under the said laws to

have their persons protected from violence when so then and there under arrest as aforesaid.

4 And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sydney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandall, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Collinsworth, and S. W. Brassfield, with certain other persons whose names are to the said grand jurors unknown, did then and there with force and arms unlawfully conspire together as aforesaid then and there for the purpose of depriving them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, of their rights to the due and equal protection of the laws of said State and of their rights to be protected in their persons from violence while so then & there under arrest as aforesaid and while so then & there in the custody of the said deputy sheriff, and did then & there deprive them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, of such rights and protection and of the due and equal protection of the laws of the said State, by then & there while so under arrest as aforesaid and while so then and there in the custody of the said deputy sheriff as aforesaid beating, bruising, wounding, and otherwise ill-treating

5 them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, contrary to the form of the statute in such case made & provided, and against the peace and dignity of the United States.

2. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, J. W. Harris, Tobe Harris, Milton Harris, Sydney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandall, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Collinsworth, and S. W. Brassfield, on, to wit, the day and year aforesaid, in said county and within the jurisdiction of this court, with force and arms unlawfully did conspire together and with certain other evil disposed persons whose names are to the grand jurors aforesaid unknown, for the purpose then and there of preventing and hindering the constituted authorities of the State of Tennessee, to wit, one William A. Tucker, the said William A. Tucker, being then & there a deputy sheriff of said county and then and there acting as such, from giving and securing to Robert R. Smith, William J. Overton,

6 George W. Wells, junior, and P. M. Wells, then and there being citizens of the United States and of said State, that due and equal protection of the laws of said State in this, to wit: that at and before the entering into of said conspiracy on, to wit, the day and year aforesaid, in said county, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells were held under and in arrest by, and were there and then in the lawful custody of, the said deputy sheriff under and by virtue of certain warrants duly issued by a certain acting justice of the peace in and for said county, to wit, by W. W. Whitaker, an acting justice of the peace in and for said county, to answer certain criminal charges, the nature of which said criminal charges being to the grand jurors aforesaid unknown; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that it there and then thereby became and was the duty of said deputy sheriff to safely keep and hold in his custody the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M.

Wells, while so under arrest as aforesaid, and to then and there give and secure to them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, while so
7 then and there under arrest and in custody as aforesaid, the due and equal protection of the laws of said State in this behalf; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sidney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandal, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Collinsworth, and S. W. Brassfield did then and there conspire together as aforesaid and with certain other evil disposed persons whose names are to the grand jurors aforesaid unknown, for the purpose there and then of preventing and hindering the said deputy sheriff from so then and there safely keeping and holding in his custody as such deputy sheriff the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, and for the purpose then and there of preventing the said deputy sheriff from giving and securing to them, the said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, while so then and there under arrest and in custody as aforesaid the due and equal protection of the laws of said State, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

8 3. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sidney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandall, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Colinsworth, and S. W. Brassfield, on, to wit, the day and year aforesaid, in said county, and within the jurisdiction of this court, with force and arms, unlawfully did conspire together, and with certain other evil-disposed persons whose names are to the grand jurors aforesaid unknown, for the purpose there and then of preventing and hindering the constituted authorities of the State of Tennessee, to wit, one William A. Tucker, the said William A. Tucker there and then being a deputy sheriff of said county, and then and there acting as such deputy sheriff, from giving and securing to one Robert R. Smith, the said Robert R. Smith then and there being a citizen of the United States and of said State, the due and equal protection of the laws of said State in this, to wit, that at and before the entering into of the said conspiracy, on, to wit, the day and year
9 aforesaid, in the said county, the said Robert R. Smith was held under and in arrest by, and then and there in the lawful custody of, the said deputy sheriff, under and by virtue and authority of a certain warrant duly issued by a certain acting justice of the peace of said county, to wit, by one W. W. Whitaker, then and there being an acting justice of the peace of said county, to answer certain criminal charges, the nature of which criminal charges being to the grand jurors aforesaid unknown; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that it there and thene thereby became anp was the duty of the said deputy sheriff to safely keep and hold in his custody the said Robert R. Smith while being so then and there under arrest as aforesaid, and to then and there give and secure to him, the said Robert R. Smith, while being so then and there under arrest and in custody as aforesaid, the due and equal protection of the laws of said

State in this behalf; and the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sidney Harris, Virgil M. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandall, Charles L. Miller,
Hugh McGavock, W. W. Hammell, A. J. Colinsworth, S. W.
10 Brassfield did then and there conspire together as aforesaid, and with certain other evil-disposed persons whose names are to the grand jurors aforesaid unknown, for the purpose then and there of preventing and hindering the said deputy sheriff from so then and there safely keeping and holding in his custody as such deputy sheriff as aforesaid the said Robert R. Smith, and for the purpose then and there of preventing and hindering the said deputy sheriff from giving and securing to him, the said Robert R. Smith, while so then and there under arrest and in custody as aforesaid, the due and equal protection of the laws of the said State of Tennessee, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James N. Harris, Tobe Harris, Milton Harris, Sidney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell,
John Hunt, William Best, William Crandall, Charles L. Miller,
11 Hugh McGavock, W. W. Hammell, A. J. Colinsworth, and S. W. Brassfield, on, to wit, the day and year aforesaid, in the said county, and within the jurisdiction of this court, unlawfully, with force and arms, did conspire together, and with certain other evil-disposed persons whose names are to the grand jurors aforesaid unknown, then and there, for the purpose of depriving said P. M. Wells, the said P. M. Wells then and there being a citizen of the United States and of the State of Tennessee of the equal protection of the laws, in this, to wit, that theretofore, to wit, on the day and year aforesaid, in said county, the said P. M. Wells having been charged with the commission of a certain criminal offence against the laws of said State, the nature of which said criminal offence being to the grand jurors aforesaid unknown, and having upon such charge been then and there duly arrested by the lawful and constituted authorities of said State, to wit, by one William A. Tucker, the said William A. Tucker then and there being a deputy sheriff of said county, and then and there acting as such, and the said P. M. Wells having been so then and there arrested as aforesaid, and being so as aforesaid under arrest and in the custody
12 of the said deputy sheriff then and there as aforesaid, then and there thereby, and by virtue of the laws of said State, became and was entitled to the due and equal protection of the said laws, and was then and there thereby entitled, under and by virtue of and according to the laws of said State, to have his person protected from violence while he, the said P. M. Wells, was so then and there under arrest and in custody as aforesaid. And the grand jurors aforesaid, upon their oaths aforesaid, do further present that the said R. G. Harris, E. D. Harris, James W. Harris, Tobe Harris, Milton Harris, Sidney Harris, Virgil M. Tucker, W. A. Tucker, A. J. Tucker, Samuel Hudgins, Nathan Brown, W. A. Powell, John Hunt, William Best, William Crandal, Charles L. Miller, Hugh McGavock, W. W. Hammell, A. J. Colinsworth, and S. W. Brassfield, and certain other persons whose names are to the grand jurors aforesaid unknown, did then and there, with force and arms, unlawfully conspire together as aforesaid then

and there for the purpose of depriving him, the said P. M. Wells, of his rights to the due and equal protection of the laws of said
13 State, and of his right to be protected in his person from violence while so then and there under arrest as aforesaid and while so then and there in the custody of the said deputy sheriff, and did then and there deprive him, the said P. M. Wells, of such rights and protection, and of the due and equal protection of the laws of said State of Tennessee, by then and there, and while he, the said P. M. Wells, was so then and there under arrest as aforesaid, and while he, the said P. M. Wells, was so then and there in the custody of the said deputy sheriff as aforesaid, unlawfully beating, bruising, wounding, and killing him, the said P. M. Wells, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

W. W. MURRAY,
United States District Attorney for the Western District of Tennessee.

14 Endorsement.

No. 1415. Circuit court of the United States, western district of Tennessee. The United States vs. R. G. Harris, Hugh McGavock, Wm. Crandall, E. D. Harris, S. W. Brassfield, A. J. Tucker, Tobe Harris, Sam'l Hudgins, W. H. Hammell, Nathan Brown, James W. Harris, A. J. Collinsworth, W. A. Tucker, Milton Harris, Sidney Harris, Virgil M. Tucker, William Best, W. A. Powell, Charles Miller, John Hunt. Indictment for conspiracy under section 5519 Revised Statutes.

Witnesses: William F. Poston, Thomas Harrell, Wm. Moore, P. M. Neal, D. W. Worlds, J. F. Conley, John Clark, R. R. Smith, Geo. W. Vaughn, W. T. McLin, R. G. Cotes, J. H. Farmer, Alexander Hughes, W. W. Whitaker, G. W. Wells, junior, Jack Conly. Sworn to give evidence before the grand jury on this indictment this fifth day of Dec., A. D. 1876.

D. T. PORTER,
Foreman of Grand Jury.

A true bill.

D. T. PORTER,
Foreman of Grand Jury.

Returned into open court by the grand jury and filed the 7th day of Dec., 1876.

No. 1415.

H. E. ANDREWS, *Clk.*

(Indorsed:) No. 1415. Circuit court of the United States, western district of Tennessee. The United States vs. R. S. Harris et als.

15 *Demurrers to indictment.—Filed February 5th*, 1878.

In the circuit court of the United States in and for the western district of Tennessee.

THE UNITED STATES
vs.
R. G. HARRIS ET ALS. } No. 1415.

And the said defendants, by their attorney, say that the indictment in this case is not sufficient in law, and they do therefore demur to the

same, and the said defendants do show to the court the following causes of demurrer to the said indictment, that is to say:

First. Because the matters and things set forth and charged in the several four counts, inclusive, do not constitute offences against the laws of the United States, and do not come within the purview, true intent, and meaning of section 5519 of the Revised Statutes of the United States, nor of any act of the Congress of the United States.

Second. Because the matters and things in said indictment set forth and charged do not constitute offences cognizable in the circuit court of the United States, and do not come within its power and jurisdiction.

Third. Because the offences created by section 5519 of the Revised Statutes of the United States, and upon which section the aforesaid four counts are based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and
16 things therein referred to a' judicially cognizable by State tribunals only, and legislative action thereon is among the rights reserved to the several States and inhibited to Congress by the Constitution of the United States.

Fourth. Because the said section 5519 of the Revised Statutes of the United States, in so far as it creates offences and imposes penalties, is in violation of the Constitution of the United States, and an infringement of the rights of the several States and the people thereof.

Fifth. Because said four counts in said indictment, and each of them, are too vague, general, insufficient, and uncertain to afford the respective defendants proper notice to plead and prepare their defence, nor do said counts, or either of them, set forth any specific offence under said section of the Revised Statutes or any law of the United States.

Sixth. Because in said first count of said indictment there is no statement of any crime or offence, or of any facts constituting any crime or offence against the laws of the United States or State of Tennessee for which the said R. R. Smith, William J. Overton, George W. Wells, junior, or P. M. Wells, or either of them, had been arrested or were liable to arrest by any person, officer, or authority whatever.

Seventh. Because in the second count of said indictment there is no statement or charge of any crime or offence for which said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells had been arrested or were liable to arrest by any authority whatever.

17 Eighth. Because no "criminal charges to the grand jurors unknown" can in law furnish a basis on which said grand jury can found an indictment as in the second count of said indictment is alleged.

Ninth. Because in the third count of said indictment it alleged that said R. R. Smith was held in arrest to answer "certain criminal charges being to the grand jurors aforesaid unknown," said criminal charges not being named or stated, nor any facts set forth from which the nature or existence of said criminal charges may be known or inferred.

Tenth. Because in the fourth count of said indictment no crime or offence is stated as the basis of the arrest of said P. M. Wells, nor are any facts stated or set forth in said indictment from which it appears, or can be legally inferred, that said P. M. Wells was under lawful arrest for any crime, offence, or cause whatever; and because "criminal offences being to the grand jurors aforesaid unknown" is no offence in law whatever, and cannot give to such grand jurors any right, authority, or jurisdiction whatever to return an indictment against these defendants or either of them.

Eleventh. Because there is no charge, statement, allegation, or affirmation in said indictment, or either count therein, that the crimes and offenses in said indictment named, or either of them, which in said indictment are imputed to these defendants, or either of them,
18 were committed against said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, or either of them, because of the race, color, or previous condition of servitude of said Robert R. Smith, William J. Overton, George W. Wells, junior, and P. M. Wells, or either of them.

ETHERIDGE AND MCFARLAND,
Attorneys for Defendants.

Joinder in demurrer.

W. W. MURRAY,
U. S. Attorney.

19 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its November term, A. D. 1877, at the United States courthouse, in the city of Memphis, in said district, on, to wit, the ninth day of February, A. D. 1878, in the following cause, to wit:

THE UNITED STATES, PLAINTIFFS,
vs.
R. G. HARRIS ET ALIOS, DEFENDANTS. } No. 1415. Indictment.

Came the district attorney, on behalf of the United States, and came also the defendants indicted herein, by their attorneys, when this case came on to be heard before the honorable John Baxter, circuit judge, and the honorable Connally F. Trigg, district judge, presiding, on the demurrer of the said defendants, filed herein on the fifth day of February, A. D. 1878, to the indictment herein, and the said judges being divided in opinion on the point of the constitutionality of the section of the Revised Statutes of the United States on which the said indictment is based, being section number 5519 thereof, and being also divided
20 in opinion as to the questions raised by the first, second, third, and fourth points of the said demurrer, after argument, hereby direct the said point and questions to be certified to the Supreme Court of the United States for its decision thereon, and the same is accordingly ordered. And it is further ordered by the court that this case be continued until the decision of said Supreme Court in the premises.

JNO. BAXTER,
Circuit Judge.
CONNALLY F. TRIGG,
District Judge.

21 THE UNITED STATES OF AMERICA:

Sixth circuit and district of West Tennessee.

I, Horace E. Andrews, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the papers

hereto attached are a full, true, perfect, and correct copy of the *of the* entire record and proceedings, except the capiases and recognizances, in said court, as the same now appear of record and upon the files in my office in the following cause, to wit, The United States vs. R. G. Harris et als. No. 1415.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this thirteenth day of February, A. D. 1878, and of the Independence of the United States the 102nd year.

[SEAL.]

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

(Indorsement on cover:) No. 7. The United States, plaintiffs, vs. R. G. Harris et al. W. Tennessee C. C. U. S. Filed 12th April, 1878.

16-644

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 148.

HENRY J. ROGERS, APPELLANT,

vs.

WILLIAM F. DURANT, IMPLEADED WITH JAMES W. DAVIS ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED NOVEMBER 13, 1879.

SUPREME COURT OF THE UNITED STATES.

No. 148.

HENRY J. ROGERS, APPELLANT,

vs.

WILLIAM F. DURANT, IMPLEADED WITH JAMES W. DAVIS ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof on Monday, the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the one hundred and third year.

WILLIAM H. BRADLEY, *Clerk.*

HENRY J. ROGERS
v.
WILLIAM F. DURANT, IMPLEADED WITH James W. Davis, M. B. Sprague, Pierson S. Mattox, William Ruth, H. C. Crane, trustee for W. D. Train, T. P. Richards, and J. H. Gessner. } In chancery.

1*a* UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

HENRY J. ROGERS, COMPLAINANT,
vs.
WILLIAM F. DURANT, IMPLEADED WITH James W. Davis, M. B. Sprague, Pierson S. Mattox, William Ruth, H. C. Crane, trustee for W. D. Train, T. P. Richards, and J. H. Gessner, defendant. } In chancery.

ABSTRACT OF CASE.

Lawrence, Campbell & Lawrence, solicitors for defendant.

1*b* UNITED STATES OF AMERICA,
Northern District of Illinois:

In the circuit court thereof.

HENRY J. ROGERS, COMPLAINANT,
vs.
WILLIAM F. DURANT, IMPLEADED WITH James W. Davis, M. B. Sprague, Pierson S. Mattox, William Ruth, H. C. Crane, trustee for W. D. Train, T. P. Richards, and J. H. Gessner, defendant. } In chancery.

ABSTRACT OF CASE.

Bill.

Bill filed June 17th, 1875.
Amended bill filed February 24th, 1876.
Answer of William F. Durant to same, filed May 24th, 1876. Replication to answer to amended bill, filed May 24th, 1876.

The complainant in his amended bill alleges:

That he is a citizen of the State of Wisconsin.

That Davis is a citizen of Nebraska; that Durant and Mattox are citizens of Illinois; that Crane, trustee of Mrs. Train, is a citizen of New York; that Richards, Ruth, and Sprague, are citizens of another State than Wisconsin, but of what State is unknown to complainant.

2 Bill further alleges that from November 20th, 1867, to about January 1st, 1871, the defendants were engaged as copartners in business in furnishing ties and lumber to the Union Pacific Railroad Company under the firm name, style, and description of James W. Davis and Associates.

The bill then describes 20 pieces of commercial paper, consisting of checks and drafts, made or accepted by James W. Davis and Associates, each of which is alleged to have come lawfully into the possession of complainant for a valuable consideration, proper endorsements being alleged wherever necessary. The pieces of paper, in brief, are as follows:

1. Draft, dated April 12, 1869, at Cheyenne, drawn by Charles A. Henry on James W. Davis and Associates, in favor of Charles McDonald, at sight, for $945.99, duly accepted.

2. Draft, dated April 13, 1869, at Cheyenne, drawn by John W. McIntyre on J. W. D. and Ass'ts, in favor of Rogers & Co., at sight, for $200, which was duly accepted.

3. Check, dated May 8, 1869, at Cheyenne, by J. W. D. and Ass'ts, on Rogers & Co., in favor of F. Haggerty, for $388.45.

4. Check, dated May 17th, 1869, made by J. W. D. and Ass'ts, on Rogers & Co., in favor of T. C. Brush, for $99.35.

5. Draft, dated May 24, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of John H. Young & Co., at sixty days, for $22,738.79, upon which $12,738.79 was paid about August 1st, 1869.

6. Draft, dated May 28, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of H. Robinson, at 60 days, for $157.05.

7. Draft, dated May 28, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of Wyatt and Jones, at 60 days, for $1,038.02.

8. Draft, dated May 31, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of A. H. Hayett, for $71.69.

9. Draft, dated June 2, 1869, at Cheyenne, drawn by Hance & Ruth on J. W. D. and Ass'ts, in favor of H. J. Rogers & Co., at 60 days, for $232.82.

10. Draft, dated June 2, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of James McQuillan, at 60 days, for $314.13.

11. Draft, dated June 2, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of M. V. Lee, at 60 days, for $128.55.

12. Draft, dated June 2, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of James Crawford, at 60 days, for $300.

13. Draft, dated June 2, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of Thomas B. Biggers, at 60 days, for $295.06.

3 14. Draft, dated June 2, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts on Rogers & Co., in favor of John M. Mansfield, at 60 days, for $189.80.

15. Draft, dated June 3, 1869, at Cheyenne, drawn by J. W. D. and Asst's, on Rogers & Co., in favor of Samuel Hause, at 60 days, for $100.

16. Draft, dated June 4, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of J. M. Mansfield, for $638.96.

17. Draft, dated June 21, 1869, at Cheyenne, drawn by J. W. D. and Ass'ts, on Rogers & Co., in favor of H. J. Rogers & Co., at 60 days, for $3,084.52, on which $2,500 was paid about August 21, 1869.

18. Draft, dated November 10, 1869, at Omaha, drawn by R. S. Van Tassel, on J. W. D. and Ass'ts, in favor of himself, at 30 days, for $2,188.54.

19. Draft, dated December 5, 1869, at Cheyenne, drawn by W. W. Corlette, on J. W. D. and Ass'ts, in favor of Rogers & Co., at sight, for $250.

20. Draft, dated February 21, 1870, at Cheyenne, drawn by Samuel K. Dey, on J. W. D. and Ass'ts, in favor of Rogers & Co., at sight, for $300.

The bill alleges in regard to each of the drafts drawn on Rogers & Co. that acceptance or payment was refused upon presentation, and the same protested either for non-payment or non-acceptance, respectively, on sight or time drafts.

The bill also alleges that no part of either piece of paper has been paid, except as stated; that they were all transferred to complainant for value.

The bill further alleges that when the several checks and drafts drawn upon Rogers & Co., or H. J. Rogers & Co., were presented for acceptance, neither of the drawees had any funds of makers with which to pay the same, or any part thereof, which was well known to the defendants when the paper was made.

The bill further alleges that the complainant is informed and believes that the defendants pretend that the firm of James W. Davis and Associates, of which they were severally and respectively members, was dissolved prior to the date of any of said paper, but that complainant had no notice of any dissolution of or change in the persons composing said partnership at any time between November 20, 1867, and January 1, 1871.

That complainant acquired the ownership of said paper in good faith, in the usual course of business, within said period.

That all of the defendants held themselves out to the world as being copartners and members of the firm aforesaid; and that complainant acquired said checks and drafts in the full faith and belief that they were so, and alleges, as matter of law, that all the defendants are liable to him on said paper for two reasons:

4 First. That they were in fact copartners, under the firm name and style of James W. Davis and Associates;

Second. That they severally held themselves out to the world as being such, and that complainant acted on the faith thereof in the acquisition of said checks and drafts.

The bill further alleges that all of said commercial paper was in the possession of William E. Stiger, an attorney in New York, in 1871, in which year it was all by him deposited with A. A. Redfield, a receiver in a suit pending in the supreme court of New York, wherein the defendants in this cause, and the trustees of the Union Pacific Railroad Company were parties, and that all of said paper was lost or stolen from the possession of said Redfield, as complainant is informed and believes;

That complainant and his counsel have both made diligent search for the same without success, and that the same are, to the best of his information and belief, irrecoverably lost to him, and that the same are beyond his power and control; that he has no knowledge where any of it is; that at the time of the loss they were all the sole and exclusive property of complainant, and were all endorsed in blank.

That complainant has no description of any of said papers which would enable him to set forth, substantially accurate copies thereof, as required by the laws and practice of the State of Illinois, and that his remedy at law thereon would be exceedingly doubtful for that reason alone.

Jurisdictional averments, prayer for process (answer under oath being waived), and prays for an accounting of the total amount of principal and interest due complainant from defendants, and a money decree for the amount due, on such terms and conditions, as to security, as may be proper.

Prayer for general relief.

Affidavit of complainant, filed February 29, 1876, which describes said commercial paper, and in which complainant states:

"That he is a just and lawful owner of all the above-named instruments, and that he obtained the ownership of same in due course of business, and that the same were in his possession, and while thus the said instruments were in his possession and ownership, they were all, without the default, negligence, or carelessness of this affiant, lost, and that they are not in the possession or power of this affiant, nor any of them so in his possession or power."

5 *Answer.*

The several answer of William F. Durant, after the formal reservations, exceptions, &c., avers as follows:

The defendant denies that he was ever a partner with his codefendants in the bill, as stated in the bill, and avers that said copartnership of James W. Davis and Associates, consisted only of Davis and Gessner, and not of this defendant and his codefendants.

Defendant Durant, further answering, denies that he and his codefendants were engaged as copartners by the firm name and style of James W. Davis and Associates in the furnishing of ties or lumber for the Union Pacific Railroad from Laramie City, Wyoming, west to the junction of the Central Pacific Railroad;

That as to all the allegations of said bill respecting the commercial paper therein described, defendant has no knowledge, information, or belief concerning the same, and neither admits nor denies the same, but avers that he never made or authorized, either singly or jointly with said defendants, or either of them, the making, or incurring, or contracting, any of the obligations or indebtedness mentioned and described in the bill, and asks for strict proof thereof.

Further answering says, that on November 20, and December 3, 1867, Davis, acting for himself and M. B. Sprague, by the name and style of J. W. Davis, for self and associates, made a contract with Thomas C. Durant, Oliver Ames, and others, for the delivery by said Davis and his associates, to the second party in said contract, of one million ties, 100,000 in the vicinity of Fort Sanders, at seventy cents each, 100,000 at or near Big Lara-

mie River, 200,000 near the Big or Little Laramie River, and 600,000 at the Little Laramie River and North Platte River, or at intermediate points, at certain prices for each lot, all to be delivered at said points on the line of the Union Pacific Railroad, all of which points are east of Elk Mountain;

That in and by said contract it was also agreed to deliver certain quantities of lumber and timber along the line of said road, from Laramie, westward, at certain prices and on certain conditions, a copy of which contract is attached to the answer as Exhibits A, B, and C (the same will be found in print in the record of the 'New York suit,' Defendants' Exhibit, A).

The defendant avers that when said contract was made by Davis, he and several other defendants were not interested therein, and no copartnership then existed, and it was then undetermined what persons other than M. B. Sprague should be interested in the contract, or what interest each should have therein; but that afterwards, Richards, Ruth, Gessner, and
6 Crane, as trustee, &c., Mattox, and this defendant acquired interests in said contract from Davis; that some time in the year 1867 or 1868, Davis, and other persons unknown to the defendant, assigned a three-tenths interest in said contract to this defendant, which assignment was executed by James W. Davis, a copy of which is made Exhibit D to the answer (the same will also be found in print in the New York record.)

Defendant avers that when he acquired a three-tenths interest it was understood by and between the various persons who had acquired interests in said contract, that the material should be furnished and delivered by the parties in interest as copartners by the name and style of Davis, Sprague & Co., and that defendant always supposed, until long after said contract was completed, that the business had been done by that name and style.

Defendant avers that said million-tie contract was fully carried out and completed by the parties of the first part, and the ties delivered on the Union Pacific Railroad, eastward of a point on said road known as Elk Mountain; that all of the material covered by the million-tie contract was delivered by Davis, Sprague & Co. prior to December 1, 1868, and their joint business closed, except collecting and settling their assets and liabilities, and that none of the members of Davis, Sprague & Co. had any right or authority to use the name of this defendant, or any firm or partnership name, so as to make this defendant liable for any contract or debt, other than such as were covered by said million-tie contract.

Defendant further avers that soon after said contract was completed Davis and Gessner applied to the trustees of the Union Pacific Railroad for a contract to themselves, and not to Davis, Sprague & Co., for furnishing ties and timber west of Elk Mountain; but that inasmuch as only Davis and Gessner, of the firm of Davis, Sprague & Co., wished any further contract, said trustees declined to make such a contract, but informed Davis & Gessner that they, the trustees, would pay Davis & Gessner a reasonable price for any ties actually delivered by them to said trustees, which the latter might require in building the road.

That it was then expressly agreed and understood that neither Davis, Sprague & Co., nor any associate therein, nor the defendant Durant, nor any one except Davis and Gessner, had anything to do with any agreement or understanding as to furnishing ties west of Elk Mountain; that when Davis and Gessner made said last agreement for furnishing ties

west of Elk Mountain, it was well and publicly known that said million-tie contract had been fulfilled and completed, and that said Durant and his associates in Davis, Sprague & Co. were no longer contractors, or interested in any agreement for delivering ties, &c.

Defendant, upon information and belief, alleges that Davis and Gessner, under said agreement last mentioned, furnished a large amount of material west of Elk Mountain, and that, as partners in said work,
7 they assumed the name of James W. Davis and Associates, and transacted said business under that name and style. The defendant avers that he never had any interest direct or indirect in said last-mentioned business, and was never a party thereto, nor was said agreement made by or with his knowledge, authority, or consent, nor did he ever acquire any interest therein after the making of same, or assume any liability for the performance of the same or any part thereof, or for the payment of any debts accruing out of said business, nor did he ever take part in the business, or any transaction relating thereto, as a copartner therein or otherwise; and that he never held himself out to the complainant as having any interest, or being a partner therein, and that the materials delivered, and work done under said arrangement, was, at certain points, west of Elk Mountain.

Defendant further avers upon information and belief, that from time to time during the delivery of material under said last arrangement, the prices were fixed by agreement between Davis and Gessner, on one part, and the said trustees on the other; and that defendant had no knowledge, information or belief, as to the contract until long after the same had been made, and he was informed that said Davis and Gessner were supplying said material under the informal agreement mentioned.

Defendant further avers, that on September 26th, 1870, he, with Mordecai B. Sprague, and Pierson S. Mattox, as coplaintiffs, brought suit in the supreme court of the city, county, and State of New York, against Richards, Davis, Gessner, Ruth, Crane, as trustee for Mrs. Train, John Doe, Richard Roe, and Susan Doe, comprising, with defendant, the firm of Davis, Sprague and Co.; and James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, as copartners composing the firm of James W. Davis and Associates, and Thomas C. Durant, Oliver Ames, Sidney Dillon, and others, trustees for building the Union Pacific Railroad, and Elizabeth Davis, wife of James W. Davis, for the purpose of procuring an adjustment and settlement of accounts between the firm of Davis, Sprague, & Co., and the firm of James W. Davis and Associates; that the real names of the Browns were unknown, and the same used to represent certain persons, who were believed to have certain rights and interests in said business of James W. Davis and Associates; that such suit was a proceeding in equity, and that amongst other matters, complainants alleged herein that Davis was wrongfully converting the funds belonging to Davis, Sprague & Co., the million-tie contractors to the use of Davis and Gessner, who constituted the firm known as James W. Davis and Associates.

That neither this defendant Durant, nor his associates in Davis, Sprague, & Co., were members of the firm of James W. Davis and Associates, or in any manner interested in said agreement for ties west of Elk Mountain, or liable therefor.

8 That Davis was charged to be insolvent, a dissolution of Davis,

Sprague & Co. asked for, and plaintiffs prayed a settlement of the affairs of the associations and the money due from the railroad trustees to James W. Davis and Associates might be paid to Davis, Sprague & Co., and other persons who were creditors of James W. Davis and Associates, for an adjudication of all questions of the liability of Durant and his associates in Davis, Sprague & Co., in reference to said firm of James W. Davis and Associates, or its creditors, and that a receiver be appointed, and other relief granted, &c.

That the said suit was brought for the benefit of said complainants, and also for the benefit of all creditors of said firms, or others who would unite therein in any manner; that Davis and Gessner filed their answers in said cause, as did the trustees for building the Union Pacific Railroad.

That November 2nd, 1870, said cause was referred to A. A. Redfield, as referee, to report his conclusions of law and fact therein; that on the 28th December, 1870, one Francis M. Bixby was appointed receiver of the firms of Davis, Sprague & Co., and James W. Davis and Associates, with the usual powers, &c.

That the trustees aforesaid paid a large sum of money to said receiver in settlement of all claims against them by the firm of Davis, Sprague & Co., or the firm of James W. Davis and Associates; that during the progress of said cause, it was ascertained that it would be necessary, in order to settle all questions between the parties thereto, and between Davis, Sprague & Co. and James W. Davis and Associates, both as between themselves and also with the said trustees, and also for the purpose of determining the proper distribution of the fund paid to the receiver, to determine what persons were liable to the creditors of Davis, Sprague & Co., and also of James W. Davis and Associates, so that the assets might be marshaled, &c., and that it was ascertained that there were creditors of Davis, Sprague & Co. to the amount of about forty thousand dollars, and of Davis and Gessner, or of James W. Davis and Associates, to a large amount, and that both classes of creditors claimed the fund due from the said trustees, and claimed that this respondent and his associates, of Davis, Sprague & Co., were liable for said debts.

That thereupon an order was made in said cause, and notices given that all creditors of either of said contracting associations should present their claims, with proofs, before said Redfield (a copy of which order is made Exhibit F to the answer, and is found in print in the New York record).

That a large number of the creditors of Davis, Sprague & Co., and James W. Davis and Associates, claimants against said fund, appeared and made claims and showings in said cause, in the nature of petitions, before said referee, and all claimed that the persons comprising Davis, Sprague & Co., including this defendant, were liable to the various creditors on said claims; and that this defendant was a partner in Davis, Sprague & Co., and James W. Davis and Associates, and liable as well for the work done west of Elk Mountain, as for that under the million-tie contract; and that the complainant, Rogers, was one of those who filed their claims, and that the claims filed by him in New York were upon the identical pieces of commercial paper described in the bill in this cause.

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That the issues in said cause tried by the said referee were, amongst others, directly and distinctly as to whether or not there were two distinct firms

in reference to said contracts and business, known as Davis, Sprague & Co., and James W. Davis and Associates; what persons composed each firm, and to what extent said firms and their individual members, respectively, were liable on the claims filed before said referee, and amongst others on the said claims filed by the said Rogers; and also whether this respondent and his associates of Davis, Sprague & Co., were members of James W. Davis and Associates, or were liable for the said debts claimed by the said Rogers in said cause, and whether the same were the debts of Davis, Sprague & Co. or of James W. Davis and Associates, or of Davis and Gessner; and also whether defendant Durant was liable on any of said debts and claims growing out of or pertaining to work done west of Elk Mountain;

That Rogers filed his claims on the said order, and in support of the same appeared before the referee in person and by attorney, and introduced testimony from time to time during the years 1870 and 1871 upon said issues, and thereby became in law and in fact a party, and privy to said cause and proceedings;

That on the 9th and 10th days of December, 1871, and March 14th, 1872, said referee filed certain reports in said cause, in which he found that Davis, Sprague & Co. were not liable on certain classes of claims, which included those filed by Rogers; that the claims embraced in "Class I" of his report were not properly chargeable to the associates under the million-tie contract, or any fund in the hands of the receiver pertaining thereto; and that Durant was not liable therefor, but that only Davis and Gessner were liable thereon, and that the respondent was only liable for claims specified in "Class II" of said report, which grew out of the said million-tie contract (a copy of which said report is made Exhibit G to the answer, and may be found in print in the New York record).

That afterwards said reports were duly confirmed in all things by the supreme court of the State of New York, and a final decree entered (a copy of which is made Exhibit H to the bill, and is printed in the New York record);

That on the entry of said judgment and decree, said Rogers appeared in court by counsel, and took part in the settlement thereof, and that the same is unappealed from and unreversed, and still remains in full force and effect.

The answer then avers that certain claims shown in "Class I" in referee's report, which are described in this answer, are the same which were presented by Rogers in the New York suit; and that certain others described in Rogers' bill were also presented by him in the New York suit, and are found in the referee's report, but with a slightly different description.

Defendant further avers that a portion of the funds in the hands of the receiver, F. M. Bixby, belonged to the firm of James W. Davis and Associates, composed only of Davis and Gessner, and a portion to Davis, Sprague & Co.; that it was apparent, and believed by all interested, that the holders of the claims against the million-tie contractors would receive a much larger dividend than the creditors under the Davis & Gessner tie contract west of Elk Mountain;

That one of the main controversies in said cause and proceeding before said referee, was as to where said million-tie contract ended and said Davis

& Gessner contract commenced, and as to whether the various claims presented were the debts or obligations of the parties to the million-tie contract, or of the parties to the Davis & Gessner tie contract, and whether this defendant was a partner with Davis & Gessner in the last mentioned contract; and that as to the claims presented by Rogers, the precise and principal question at issue was as to whether said debts and obligations were those of Davis, Sprague & Co., and whether or not this defendant was interested in the firm of James W. Davis and Associates, and that it was necessary to a decision of said cause upon an allowance of said claims and each of them, and a distribution of the funds in the hands of the receiver, to ascertain whether not the parties in interest in the million-tie contract, and said Davis & Gessner tie contract were identical, and whether the firms of James W. Davis and Associates, and Davis, Sprague & Co., were composed of the same individuals or not, and what individuals composed each firm; that said question was in issue between Rogers and this defendant, together with others; that Rogers introduced testimony, and was heard thereon, and the same fully litigated and contested, and that in and by the judgment of said court it was adjudged that this respondent was neither a partner in the firm of James W. Davis and Associates, nor interested in said contract for ties west of Elk Mountain, and that the several claims, and each of them presented by Rogers, and mentioned in the bill in this cause, were the obligations of Davis & Gessner only, who were adjudged to be the only persons composing the firm of James W. Davis and Associates.

The answer contains further formal allegations to the effect that the question of Durant's liability upon such paper is res adjudicata, and it further avers that after the entry of said decree said Rogers, well knowing the same, accepted a dividend upon his claims to the amount of about fifteen per cent. of the face thereof, which was paid out of the funds belonging to James W. Davis and Associates, and that said Rogers thereby acquiesced in said decree, and has continued so to do, &c., and that the same is binding
11 upon complainant, and that he is estopped from prosecuting this defendant, either singly or jointly with others, upon said commercial paper mentioned in his bill.

The defendant further denies that either he or the firm of Davis, Sprague & Co. or James W. Davis and Associates, or any firm or association in which said defendant had any interest, or for which he was responsible or liable, ever executed or accepted any of the commercial paper described in said bill. He further denies that he has had any notice of the non-payment or non-acceptance of the said commercial paper, and asks for strict proof thereof. He further denies that when said drafts and checks were made or drawn upon Rogers & Co., or H. J. Rogers & Co., and presented, he had any knowledge that the drawees had no funds of makers with which to meet the same.

Defendant avers that he had no knowledge whatever with regard to the state of accounts between James W. Davis and Associates and the firm of H. J. Rogers & Co., or Rogers & Co., and had no interest therein; that he is informed and believes, and therefore states the facts to be, that the complainant purchased all, or nearly all, of the paper mentioned in his bill long after maturity, with full notice of all defendant's equities in the case, and that other persons, unknown to the defendant, are equitably interested therein, and said Rogers has taken the same to collect upon shares,

and also that the said Rogers has, by the receipt of the dividend as stated, been fully or in large part repaid for all his outlays in the purchase of said paper, &c., and he further denies, upon information and belief, that the complainant is the owner of the said bills, drafts, checks, &c., as alleged, and further answering, avers that said complainant has a complete and adequate remedy at law.

Formal conclusion, &c.

12 *Testimony.*

HENRY J. ROGERS, the complainant, being sworn on his own behalf, at Chicago, on the 16th day of November, 1876, testified as follows:

My name is Henry J. Rogers. I am the complainant in this suit.

From 1867 to 1871, I was banking in Cheyenne, Wyoming Territory. I was then acquainted with an association of individuals engaged in furnishing ties to the Union Pacific Railroad, but did not know all of the partners. The name of the association was J. W. Davis & Associates. I knew Davis, Sprague, Mattox, Gessner, Ruth, and had met Durant. I knew the firm from early in 1868 till 1871 or 1872. Their operations were carried on from the Black Hills to Ogden.

I have heard the name of Davis, Sprague & Co., but never knew of but one business transaction in that name.

Kountze Brothers & Co. and Rogers & Co., of which latter firm I was a member, did business for this firm in Wyoming; Rogers & Co. for about three years. They transacted their business with Rogers and Co. by the name of J. W. Davis & Associates, and negotiated with us a large quantity of checks, drafts, acceptances, and other commercial paper, on which money was paid to their order.

All of the commercial paper of James W. Davis & Associates, payable to their order, and which belonged to them to take care of, was provided for. Towards the last they overdrew their bank account, and that they did not provide for.

Rogers & Co., in the regular course of business, became the owners of certain acceptances of James W. Davis & Associates, which were not all provided for by them, as follows:

(Witness here describes the paper mentioned in the bill.)

These acceptances, checks, and drafts now belong to me. I have owned them individually very nearly since the date of them, having acquired them by purchase in the regular course of business.

Q. By whom were these checks signed?

(Objected to by Mr. Lawrence.)

13 A. James W. Davis & Associates, by C. Christopher, cashier. His first name was Cornelius.

I had seen a large amount of other commercial paper of James W. Davis & Associates which was paid, and some of which, I suppose, is still out.

I must have paid out half a million dollars on their paper.

Davis & Sprague were the managers in Wyoming. The financial part of the business was a part of the time in charge of Mattox, and part of the time Christopher.

He had charge when the paper which I hold was made.

I have never heard that he had not authority to make it.

This paper was at Cheyenne at its maturity, and all these checks, acceptances, and drafts were presented, and protested for non-payment.

(Above testimony objected to as incompetent, by Mr. Lawrence.)

There was no funds to meet this paper.

The way I got these checks was this: They were drawn on a bank, and protested, and I bought them.

It was customary in Wyoming to protest bank checks for non-payment, when drawn against no funds.

I knew of the existence, in the supreme court of the State and county of New York. of a suit in which Durant, Sprague & Mattox were plaintiffs, and other members of James W. Davis and Associates, were defendants. It was in 1870, I think. Through my attorney, William E. Stiger, I presented the commercial paper, which I have stated I owned, in that suit, to the referee as a claim against James W. Davis and Associates.

Q. Did you receive notice, general or special, to make proof or litigate concerning the persons who composed the partnership of James W. Davis and Associates?

(Objected to.)

A. I never did.

I never had any notice what I would be required to prove, or what would be in issue, so far as I was concerned, except the order of court made requiring claimants against that firm to file their claims.

My proof was confined to my claims.

When I first knew this association in Wyoming, it was known to the public generally as James W. Davis and Associates.

14 No change of name was ever made known or manifested to the public from the beginning to the end of their operations.

Mattox never notified me that a change had been made at any time, nor Christopher, nor any one else.

Throughout my residence in Wyoming, I was intimate with Davis, Mattox and Christopher.

I first saw the books in which the accounts of this firm were kept in 1868, and afterwards in New York in 1870 or 1871.

Q. In what name were those books kept?

(Objected to.)

A. In the name of James W. Davis and Associates.

I never saw any receipts given by this firm to the Union Pacific Railroad Company, nor any time checks signed by them.

I can't call to mind just now that I ever saw anything in the world where the firm name would be signed, except commercial paper, as I have stated.

The firm had no sign out.

I never knew of or saw the firm receiving freight from abroad, or consignments of goods.

I didn't do business with them at first. They banked entirely with Kountze Brothers in the first place.

I first commenced business with them in the way of collecting from them, in 1868, and continued to handle their paper for three years, from early in 1868 till they closed business.

There was no difference whatever in the name appended to their commercial paper, from my first transactions with them throughout the whole,

except that in the fall of 1867 there was put in my hands for collection some notes, I think two, signed Davis, Sprague & Co. At maturity I presented them to Mattox, who was cashier of the concern, who paid me. I think the amount was about $20,000, at sixty days after date, or thereabouts, and dated in the fall of 1867. Mattox paid me by checks on Kountze Brothers & Co., and signed the checks "James W. Davis and Associates, by Pierson S. Mattox." That is the only transaction that I have any knowledge of.

There were two daily newspapers published in Cheyenne, one of them all the time I was there. No notice of change of firm was ever inserted in these papers that I saw, and I was familiar with them and read them daily.

15 I saw the contract between the Union Pacific Railway and this association for furnishing ties. It was signed by H. C. Crane, trustee, I think, for the Union Pacific Road, I suppose, or contractors for the Union Pacific Road, and James W. Davis and Associates.

I am quite sure that it was signed James W. Davis and Associates.

I never saw the paper but once.

I had the commercial paper, of which I have given a list, in my possession up to the time it was presented to the referee in New York. I gave it to my attorney. I haven't seen any of it since. I gave it to him to file with the referee in this suit, as requested.

I received, by reason of the adjudication in that suit, about fifteen per cent. of the amount of my claim, which was allowed. The total I don't remember; my attorney sent it to me.

I never made any agreement, admission, or stipulation whatever, or authorized my attorney to do so, at the time I received this amount.

I have never had notice of any withdrawal of any members of the original firm of James W. Davis and Associates, or any change in that firm, until this suit in New York.

During the operations of James W. Davis and Associates Durant was out there once, and opened a lumber-yard for them in Laramie City.

Q. State if he held himself out to the world as a member of the firm of James W. Davis and Associates.

(Objected to.)

A. He did.

I never talked with him about the indebtedness of the firm, except in New York, where I had a conversation in reference to another claim that I had against this firm of J. W. Davis and Associates, in which I was a surety on an appeal bond. I appealed to Durant to try and have the money raised by himself and his associates to take up this obligation. He agreed to do all he could for me to get the money to take it up, and seemed to do so, but did not raise the money. This obligation was given in a suit of Collins against Davis and Associates, or Davis, Sprague & Company. Collins was plaintiff and either Davis and Associates or Davis, Sprague & Company were defendants; don't remember which.

Cross-examination:

The first transaction I had with defendants in this suit was early in 1868. It consisted in the collection of two notes for about $20,000,

16 which I have spoken of. That was the only transaction in which

I ever knew of the name of Davis, Sprague & Co. being used in business.

Of the parties who were furnishing ties to the Union Pacific Railroad, under the contract which I referred to in my direct examination, I never saw any of their paper with the name of Davis, Sprague & Co. upon it. I never saw any of the paper used by them in the course of their business, such as receipts, vouchers, accounts, &c., with the name of Davis, Sprague & Co. upon it.

The name of Davis, Sprague & Co. might have occurred in the books kept by the defendant, but I never saw it.

I never made any examination of the books as to that fact and consequently can't say it did not occur.

The firm of Rogers & Co. was originally composed of myself and the stockholders of the First National Bank of Denver, or rather it was a kind of a branch of that bank. This was when I first became acquainted with this association, and it continued so until about January 1st, 1869, when I bought out the interest of the Denver bank, and continued for a few months under the same name, and then took in as a partner Charles D. Sherman. That firm lasted till late in the year 1870, perhaps in 1871.

I know where Elk Mountain is; the Black Hills are east of it.

I think this firm commenced delivering ties about half way between Cheyenne and Laramie.

As near as I can fix it, James W. Davis and Associates commenced banking with Rogers & Co. some time in the winter of 1868–'9.

I don't know whether Mattox, Christopher, or Davis opened the account; it was one of them.

I can't say how much money had been deposited with us up to May 1st, 1869. I couldn't come within fifty thousand dollars of it.

On the 7th, 8th, and 9th of May, 1869, Davis and Associates deposited in my hands paper of the Union Pacific Railroad Co. to the amount of about $250,000, which paper was to their order, drawn at 30 and 60 days, and one sight draft on Omaha for $50,000 included in it.

C. Q. Was not there also a deposit with your firm at that time of about $30,000 to meet immediate demands in the way of checks, &c.?

A. This draft on Omaha was to meet immediate demands, and may have been less than $50,000. I don't remember the exact amount, but they drew against the whole amount, and I accepted.

17 I became the owner of the McIntyre draft for $200.00 on the day it was given. I bought it out and out for cash at its face.

The Hance & Ruth draft for $232.82 was 60-day paper. I can't tell you who I bought it from, or when I bought it. It was payable to the order of H. J. Rogers & Co., of which firm I was the head, being located at Laramie City.

I can't tell how much I gave for it, as I was not in the active management of that concern.

I couldn't say when I became the individual owner.

The Van Tassell draft, dated November 10, 1869, at 30 days, for $2,188.54, I bought of him before its maturity, if I remember right. I traded him a buggy, his note, and a horse for it. The horse and buggy were each worth $250. I don't remember the amount of his note, it was one I had loaned him some money on account—or his firm note, Van Tassell and

somebody else. I had the note for some lots I had sold him in Cheyenne. I became the owner of the draft absolutely.

I became the owner of the draft of W. W. Corlette, for $250, dated December 5th, 1869, on the day it was drawn. It passed to Corlette's credit for the face of it.

I got it from him individually, and I think he has drawn against it for its full amount. I never charged the draft, or any portion of it back to him, when it remained unpaid. He had probably drawn out his balance.

I became the owner of the sight draft of S. K. Dey, dated February 21, 1870, for $311, on the day it was drawn. I gave $311 for it. Dey then owed me about $1,500, and I credited him the amount of the draft, and never got a cent of the balance.

The sight draft drawn by C. A. Henry, April 12, 1869, for $945.99, I bought of his partner, McDonald, about the time it was coming due. Don't remember how much I gave for it. I discounted it; all I could make him stand, probably. My regular rate then was two per cent. per month, at which rate I did some of Davis and Associates' paper.

The check of James W. Davis and Associates, on Rogers & Co., May 8th, 1869, for $384.45, to the order of T. Haggerty, I bought after protest. I don't remember who I bought it of, nor what I gave for it.

The check, dated May 17, 1869, on Rogers & Co., by the same makers, to the order of T. C. Brush, I became the owner of, after it had been presented and protested.

I don't remember how long after. Probably less than a year.
18 My best impression is, that it was three months. Don't think I bought it of Brush. Couldn't guess what I gave for it.

The draft for $22,738.79, I think, was drawn in the name of J. H. Young & Co., or Henry & Young. They were associated together in some way. I became the owner of that the day it was drawn, giving credit and money for it. I took up some of Henry & Young's paper, and some of it is not taken up to this day.

I bought it out and out, discounting it at a reasonable rate.

The $12,738.79 paid on it was paid to me by check given by Christopher, the date of which I don't remember. The check was drawn on Rogers & Co. for that amount.

I can't tell you anything about the draft on Rogers & Co. in favor of H. Robinson, dated May 28th, 1869, for $157.05; neither how I got it, when, nor where, nor what I gave for it.

The draft of May 28, 1869, on Rogers & Co., in favor of Wyatt & Jones, was a time draft, of which I became the owner by purchase from the payees on the day it was given. I bought it out and out.

Don't remember if they owed me at that time.

I don't remember when or of whom or for what amount I bought the draft dated May 1st, 1869, to the order of A. H. Hyatt, for $71.69.

The same way as to the draft of June 2, 1869, in favor of McQuillan, for $314.13. Same as to draft in favor of M. V. Lee, June 2d, 1869, for $128.55.

The draft of June 2, 1869, in favor of James Crawford, for $300, I bought of him, but don't remember when or for what amount.

The draft in favor of Thomas B. Biggers, same date, for $295.06, I bought, I think, of him, about the time it was given. I don't know at

what figure. He was owing our firm at that time, and is yet; I took it on account.

The draft in favor of J. M. Mansfield, for $189.80, same date, I got from the house at Laramie City. It was turned over at the time we closed out, though I had it before.

I can't tell when they took it. It was in my hands a little after its date. I don't know whether it was charged up to me or not.

The draft in favor of Samuel Hance for $100, June 3d, 1869, I got from the Laramie house about the time it was given.

I haven't any idea at all as to how long after. I remember there
19 was several pieces of paper. I got the draft of June 4, 1869, in favor of Mansfield, for $638.96, the same way, about the same time.

The draft of June 1, 1869, on Rogers & Co., in favor of H. J. Rogers & Co., at 60 days, for $2,084.52, I became the owner of, soon after it was given. That came from my Laramie house, and was charged up to me as its face. The $2,500 payment made on it, was after I took it. I don't remember how long.

Christopher gave me a check for that amount on Rogers & Co., which check was paid.

Mattox went out of charge of the financial department of the firm that was furnishing ties in the winter of 1868–'9, I think.

At the maturity of this paper, some of it was in my hands and some was not. Some I bought after maturity. I can't tell you who made demand of payment on the pieces of paper which I did not hold, and on which I said payment was demanded in the usual course of business, at maturity.

There was not sufficient funds in my hands to the credit of the firm that made these checks to pay them at any time after I had purchased them.

Q. How was it, then, that this check for $12,738.79 was paid?

A. There was money to pay that check.

Q. As to the $2,500 which was paid on this draft for $3,084.52?

A. There was funds to pay that, I think, if I remember right.

On looking at this printed copy of a complaint in a suit I commenced in New York against Durant and others, I find that the $2,500 was paid August 1st, 1869. The $12,738.79 on the other draft was paid about the 1st of August, 1869.

I became the purchaser, out and out, of each and all of the 20 pieces of paper which I enumerated in my direct examination. I don't hold them for anybody else, to the best of my knowledge.

I think there is an indebtedness which I have got to pay to one of these parties. I don't remember which.

It is credited to him on the books of H. J. Rogers & Co., of Laramie City. He claims that there is an indebtedness of the firm to him on account of one of these pieces of paper, but just what it is and all about it I can't tell you.

Otherwise they are all straight.

20 No one is interested with me in the result of this suit.

Q. Have you any agreement with any person, aside from your attorneys, to pay them any certain or indefinite sum, provided you win this suit?

A. I have some old unsettled matters that I have agreed to pay out of this when it is collected, but there is no party that is connected in any way, either legally or morally, or any other way.

I never had any notice in the New York suit, except a verbal request, that I remember of.

I was in New York a little while during the progress of that suit. I don't know whether I testified in the course of it.

I was there two or three times.

I never was there but once on account of the suit.

I might have been there once or twice afterwards while it was in progress. My impression is I did not testify; still I may have done so.

I made an affidavit at one time, but it was never used in the case, I think.

I heard at the time of this suit in New York that it was a matter of controversy in regard to some of the claims presented, as to whether they should be allowed against a firm called Davis, Sprague & Co., or against a firm called James W. Davis and Associates. I don't remember of its coming up, particularly, except its being talked of amongst the parties that were there.

The affidavit I referred to was drawn for me by Mr. Davis' lawyer—I don't remember whether Corlett or Steele.

I don't think I gave any evidence myself, in any way, which was used in the suit, upon the question of who composed the different firms, or whether it was all one firm.

When I first knew this association in Wyoming it was called James W. Davis and Associates, and I never had any notice or knowledge of any change in the name, and I never knew of the name of Davis, Sprague & Co. being used, except in the matter of the two notes spoken of.

I never saw any receipts of the firm to the Union Pacific Railroad Company for money, or any time-checks, and have never seen the name of James W. Davis and Associates, except in that list of commercial paper, except the signature to that contract, and the two notes for about $20,000, and correspondence.

21 I had been handling the paper of these parties about a year before they commenced banking with me.

The check Mattox gave me in payment of the two notes, which were dated in the fall of 1867, was drawn on Kountze Brothers & Co., one or two checks, signed James W. Davis and Associates by Mr. Mattox. I received those checks very early in 1868. It must have been in January, but possibly in February.

I have never seen any of the paper on this list since I gave it to Mr. Stiger. I gave it to him to prove up before the referee in the New York suit.

That was the time I was in New York with regard to the suit; and I think, though I won't say positively, the same time that I had the conversation with Durant.

Durant was in Wyoming in 1868. I talked with him a very little.

There seemed to be some trouble between Sprague and Davis, and Durant was talking to me about it.

The trouble seemed to be mainly as to who should be boss, and that was the leading part in the conversation. He spoke about his lumber yard.

I couldn't give you any idea of the conversation; it was so long ago that I don't recollect it.

That is the only time I ever saw him out West.

The conversation in New York came up in relation to this appeal bond, which I had signed. Davis' attorney suggested to me that the money might be obtained to take up that bond if Durant and Sprague would agree to it, whereupon I sailed into Durant, having understood that Sprague would make no objection to it, and that Davis and his party would agree to it. Frank said certainly he would do anything he could to help me out; that it was a hard case on me, and it should be arranged and paid. He would do all he could to help me.

"It wasn't that this money was to come out of Frank's pocket, but it was to come out of money that was there, belonging to the firm."

After we got the thing arranged, as I supposed, old Sprague kicked up and backed right plumb down, and wouldn't do anything about it. That is the sum and substance of it.

Durant held himself out to the world as a partner in James W. Davis and Associates in this way.

22 The first time I met him he was introduced to me as one of the partners, by Mr Mattox. He was only there for a short time, and took an interest in the management.

There was nothing else connected with what Durant did that I know of.

This interview was on board the directors' car, at Fort Saunders, when I was first introduced to him, in 1868. Mattox introduced me. I don't remember who was present.

I don't know that any one overheard the conversation in New York. It occurred at 20 Nassau street, in Thomas C. Durant's office.

The Collins suit, in which the appeal bond was given, was about some cattle and wagons. I don't remember if a man named Russell had anything to do with it. It was in regard to cattle which Collins claimed had been taken, which belonged to him.

I think it was claimed the cattle were taken out of Laycock's corral, in Laramie.

I don't think I presented that claim in New York. I am not sure.

I was also surety on a bond given in a suit brought by Lowry & Upton. I presented a claim upon that, in the New York suit, in the same connection.

I had both claims, and was talking with Durant about that, in connection with the Collins claim.

I think the claim was presented to the referee.

I had paid some money, or advanced money, to Collins' attorney.

I think I gave him a check for, perhaps, half of it, or perhaps only a quarter, before I went East; don't remember how much.

In that large sum of money which I received from these parties there were drafts drawn by the Union Pacific Railroad cashier on parties in Boston. I think they were drawn by Mr. Kennedy, though I don't remember the number or amount of them. I can't say if there were two for $53,000 each.

I don't think I ever stated to anybody that I took any of the claims in this suit as collateral.

I did not as to the Van Tassell claim, nor did I as to that large draft for twenty-two thousand and odd dollars.

The books and papers of Rogers & Co., I suppose, still belong to me, and they are at Cheyenne, locked up in a room in a house of mine out there, or were the last I knew of them.

Counsel for Wm. F. Durant notified complainant, Rogers, to
23 produce the books and papers of H. J. Rogers & Co., or Rogers & Co., which show or relate to any of the transactions with either Davis, Sprague & Co., or James W. Davis & Associates, before the special examiner appointed in this cause, or before the court on the hearing thereof.

Counsel for complainant admits that notice to produce said books and papers at this examination was served upon him by counsel for William F. Durant, on the afternoon of November 13, 1876. That said notice was immediately telegraphed to the complainant, who replied that the same were in Wyoming, and counsel for Durant admits that it has not been possible to procure them at this examination.

I never told Mr. Davis at any time or place, that I held the $22,000 draft, or the Van Tassel claim, or either of them, as collateral.

Redirect examination:

I am under the impression that the suits of Lowry and Upton and Collins were brought against these parties by the name of Davis, Sprague & Co. Rogers & Co. and H. J. Rogers & Co. were private bankers.

Q. In the banking transactions by which you acquired the commercial paper, did you observe the laws of the Territory relating to usury?

(Objected to.)

A. I did. I confined myself within the law on that subject.

I don't know whether there was any controversy in the New York suit as to where the million tie contract ended and the Davis & Gessner tie contract began.

That is, I mean to say, I don't know what the controversy was, except from hearsay.

I heard some talk there about an issue in this suit as to whether Durant was a partner of Davis and Associates or not.

I never gave any testimony on either of those points.

I think all the commercial paper claimed by me in this suit was protested.

William E. Stiger appeared solely for me in the New York suit.

The two notes for about $20,000 spoken of, were signed Davis, Sprague & Co.

Durant was in Wyoming some time in 1868. Don't remember what part of the year.

I didn't know of his being out there more than once.

24 Recross-examination:

Rogers & Co., though a branch of the First National Bank of Denver, was not a corporation.

I believe I bought some of this paper at fifty cents on the dollar, but I can't tell you what.

I never knew of any such contract as the Davis & Gessner contract. I heard at my first visit to New York of the controversy in the suit as to who composed the firms.

H. J. Rogers & Co., of Laramie City, closed business in the winter of 1871–'2, having commenced in 1868.

Davis showed me that contract with the Union Pacific Railroad Company in New York, when I first went down there with this paper.

CHARLES D. SHERMAN, being sworn on behalf of complainant, and examined November 16, 1876, testified as follows:

I am 32 years old.

In the early part of 1867 I was located at North Platte and Julesburg in Nebraska, then the terminus of the Union Pacific Road.

About the middle of September that fall, or the 1st of October, I went to Cheyenne, and remained there until the latter part of July, 1870. I knew Henry J. Rogers there.

I knew there was a firm there by the name of Davis and Associates, furnishing ties to the Union Pacific Road. I don't know who composed said firm. It wasn't known at that time.

My first business knowledge of that firm commenced in the spring of 1868, when they opened an account with Kountze Brothers, for whom I was cashier.

My knowledge of their business with Kountze Brothers ended in the spring of 1869.

Q. In what name was the bank account kept?

(Objected to.)

A. J. W. Davis and Associates.

The account was never kept with Kountze Brothers in the name of Davis, Sprague & Co.

25 P. S. Mattox opened the account with Kountze Brothers on behalf of Davis and Associates, as I recollect it. He was cashier at that time. I have heard him say since that he was a partner.

He did business with our bank on behalf of the firm of Davis and Associates.

I have no recollection that any notice was given us in November, 1868, or thereabouts, that a change was made in the persons composing the firm of James W. Davis and Associates.

Mattox never notified me at any time during the year 1868 or '69, that Davis & Gessner had assumed the contract of the company for furnishing ties.

There were two daily newspapers printed in Cheyenne, which I read without ever seeing any notice of change in the firm that was furnishing ties. I never heard there had been a change in that firm in the fall of 1868.

The bank account which Mattox opened for James W. Davis and Associates, in the spring of 1868, continued in the same manner as long as I was in the bank.

I don't recollect any settlement being made, and a new account begun with other parties under the same name, or any other name, in the fall of 1868.

The books of Kountze Brothers & Co. are with the First National Bank of Omaha, and not in my possession.

I never knew that there had been any successor to Mattox in that firm until the other day, in a case in New York, a man came in and swore that he succeeded him. The man was Cornelius Christopher.

I never knew of the firm of James W. Davis and Associates going by the name of Davis, Sprague & Co.

I had heard of Davis, Sprague & Co., but had a general impression, which was the impression amongst other persons, so far as I knew, that they were one and the same thing. Davis, Sprague and Co. was a sort of side issue.

I don't recollect seeing William F. Durant out there.

The paper of the firm of James W. Davis and Associates, that went through our bank, was made in that name.

I think 99 per cent. of all the bank paper or checks was signed by Mattox.

Davis himself had no authority to sign bank checks there for
26 awhile, and once in a long while we would have special authority to pay a check signed by Davis.

I saw Mattox and Davis frequently, in November and December, 1868, and January, 1869.

Neither of them told me that Davis & Gessner had acquired the contract for the delivery of ties, from November onward, and had assumed the responsibilities of the tie contract.

I don't recollect James W. Davis and Associates drawing out their entire balance from our bank, in November, 1868, nor did they close their account with us in the month of December, to my knowledge.

Cross-examination:

I became a partner with Henry J. Rogers in June, 1869, I think, and continued to be for about a year. I was only interested in the Cheyenne firm.

I knew of the firm of Davis, Sprague & Co. I have no recollection of Davis, Sprague & Co.'s paper going through the bank of Kountze Brothers & Co.

I don't think that Kountze Brothers & Co. made advances on vouchers of the Union Pacific Railroad Company issued to parties who were furnishing ties prior to November, 1868.

The only time I recollect making advances on vouchers to Davis & Associates, that would be for ties, was after November, 1868.

I remember, in January, 1869, I went to Echo, and then had vouchers for 30 or 45 days, before I went up, which was in the latter part of *of* January, 1869.

I have no recollection of any checks being drawn upon the bank of Kountze Brothers & Co., or any drafts passing through that bank, either made or accepted by Davis, Sprague & Co., or in that name.

The suit in New York, where I heard that Mattox had been succeeded by Christopher, was one brought by the latter against the firm of Kountze Brothers, in New York.

27 WILLIAM E. STIGER, being produced as a witness for complainant, at New York, Nov. 22, 1876, testified as follows:

I am 31 years of age; resident of Jersey City; an attorney, and was practicing law in the city of New York in 1873, and in that city was employed by complainant to bring an action against William F. Durant and others, for the collection of certain drafts, checks, and accounts amounting, in the aggregate, to over $20,000, which I did.

I had possession of the commercial paper and accounts on which the suit was based, in 1871, but not at the time this suit was brought. I had received them from Rogers.

I have written memorandum that I made from the commercial paper itself while in my possession, but have not got the paper now. I filed it with A. A. Redfield, the referee, in an action pending in the supreme court of the State of New York, wherein William F. Durant and others were complainants and James W. Davis and others defendants.

This was in the spring or summer of 1871.

I have not seen any of the commercial paper since.

I have endeavored to find it, and first applied to B. F. Bunker, who was clerk for the receiver in the cause, Francis M. Bixby, and failed to obtain them from him. I also applied to Mr. Redfield, the referee, and failed to obtain it from him. Also to Clark Bell, who was Durant's attorney in this suit, and to Mr. Bixby, the receiver, but did not get it.

I wanted this paper for the use of Rogers.

I don't know where it is now.

"Q. Please give a description of it from written memorandum made by you at the time it was in your possession?"

(Oral testimony with regard to said paper objected to.)

The witness then proceeded with the aid of his written memorandum, and also with the aid of written memoranda made up by a clerk of his in 1871, and also by referring to a printed copy of the complaint in the suit of Rogers vs. Durant, which the witness brought in 1873, to give a list of the commercial paper described in the bill of complaint in this cause.

WITNESS. I made my last attempt to regain possession of this paper in April or May, 1873.

"Q. Did you notify Rogers of your inability to recover it?"

28 (Objected to.)

"A. I did."

"Q. State if all this commercial paper which you have described was endorsed respectively by the payees thereof."

(Objected to as leading.)

"A. I know it was in such shape that upon the face of it Rogers had the legal title."

I appeared as attorney for Rogers in the suit brought by Durant and others against Davis and others, at his request.

His instructions were to prove his claims and see that they were allowed by the referee—proving his claims and getting his money for him.

This was in the spring, 1871.

I presented this commercial paper to the referee, and nearly all were allowed for the amount claimed.

In one or two instances the amounts were reduced.

So far as Rogers was concerned, his issues in this suit were simply as to the justice and amount of his claims.

I was not called upon or notified on behalf of Rogers to litigate anything more than what I have stated.

Upon two or three pieces of the paper a trial was had as to the amount due Rogers thereon. As to most of it there was no contest.

I think there was an issue made in this suit as to the ownership of only one or two pieces of the commercial paper I have enumerated.

Neither I nor Rogers, to my knowledge, ever received any notice to offer proof or litigate concerning the question as to who composed the firm of James W. Davis & Associates. That question was not considered at all by Rogers or me before the referee.

Q. "State if you made any agreement or stipulation, as the attorney of Rogers in the New York suit, to waive any further claim or demand against James W. Davis & Associates, or any of the individual partners therein, or any parties holding themselves out to the world as partners therein, on behalf of the commercial paper of which you have given a list above."

(Objected to.)

A. "I did not."

A dividend of about 15 per cent was paid on this paper in the suit referred to, which I received for Rogers.

29 No demand or agreement was made, at the time I received this dividend, as to waiving any further claim, as above stated.

I know James W. Davis.

Q. "Have you ever heard him say who composed the firm of James W. Davis & Associates?"

A. "I don't know how to answer that. I have heard him say repeatedly that Davis, Sprague & Co. and Davis & Associates were all one concern."

(Answer objected to by Mr. C. H. Lawrence.)

I have heard Davis state the names of some of the members of James W. Davis & Associates. That is, he stated that Davis, Sprague & Co. and James W. Davis & Associates were one and the same concern.

I know James H. Gessner.

Witness states, under objection, that he has heard Gessner make the same statements as that which he has testified to have heard Davis make.

These admissions of Davis and Gessner were made in the spring and summer of 1871.

I never filed any written pleading or answer on behalf of Rogers in the New York suit.

This admission by Davis of the identity of the two concerns was made while I was proving the claims.

I don't state positively that I heard Gessner make the same admission, but if he did it was about the same time.

Witness is shown the order of November 11, 1870, entered in the New York suit brought by Durant, Sprague & Mattox, and asked whether it was the order under which the claims of Rogers were proved up.

WITNESS. I knew nothing about this order until afterwards, but that is the order. I found out afterwards.

My impression is that I did not see the order till long after.

The only paper that was ever served on me in that case was a copy of a proposed decree to be entered therein. Afterwards the decree was entered, of which I subsequently received a copy.

The draft of the proposed decree came to me from Clark Bell, who was the attorney for the plaintiffs.

Q. "What was contained in that draft of decree served upon you by Mr. Bell, if anything, which was eliminated from the decree as entered?"

30 (Objected to.)

WITNESS. The proposed decree contained a clause making the creditors who had proved their claims before the referee parties to that action and bound by the findings of the referee therein, and I appeared before the court on the settlement of the decree and objected to this clause, and the court ordered it stricken out.

I have never seen the commercial paper of which I gave a list, since I filed it with the referee.

I never succeeded in tracing it up, but believed it was in Clark Bell's possession. Whether my belief was well founded I couldn't say.

I believed so because I was told by the referee and Bunker, the clerk of the receiver, that the rule requiring original papers to be filed was suggested by Clark Bell, and that he had complied with that rule, and subsequently Bunker informed me that the original papers which Bell had filed had been taken from the files and copies inserted in lieu thereof. When I inquired of Mr. Bell for those papers, if he had them in his possession, he replied, "I don't know whether I have or not; if I have I won't give them to you. I don't think you are entitled to them."

I also knew him to be Durant's attorney, and it was for his interests to have these papers removed or destroyed, so that no action could be brought upon them against Durant in favor of Rogers.

Some of the papers I probably had in my possession for a week or two and some a month or two.

I kept a memorandum of the dates, amounts, names of parties of this commercial paper merely, not complete copies. I made the memorandum so that I should have a record of the papers that were proved after I had filed them. I don't know of any verbatim copies being made.

I think the signature "James W. Davis & Associates," to these various drafts was all in the same handwriting.

I brought suit on this paper against Durant and others, in the supreme court of New York in the spring of 1873.

No personal service was ever had on any of the defendants.

The suit has been discontinued, no trial ever having been had.

Cross-examination:

My statement that Rogers bought the two checks payable to the order of F. Haggerty and T. C. Brush after they were protested, is made on information derived from him.

31 I have no personal knowledge of the time when, person from whom, or price at which Rogers purchased any of this commercial paper.

I can't now state what Rogers told me with regard to the purchase of this paper.

I received this dividend of about 15 per cent. from Mr. Bixby, the receiver, on September 21st, 1875, and accounted to Mr. Rogers for it.

My statement to Rogers in April or May, 1873, that I couldn't get this paper back, was made verbally, here in New York, where he was, shortly before I brought this suit for him.

Rogers told me when he first employed me, to prove his claim against the fund.

He had been here some time in 1871, before he employed me, and the suit was already pending.

That order of November 11th was published in the West, and he may

have learned about it there. I don't know. Can't say if he spoke about its being published.

I filed no pleadings for Rogers, but simply presented the papers to the referee for allowance against the funds in that cause.

I can't say positively that Rogers testified personally. My impression is that he did not, although testimony was taken in regard to some of the claims.

The paper which I examined after the question was asked, and before answering, purports to be a copy of my minutes of testimony taken on two or three of those claims.

I don't think Rogers gave or furnished any testimony in that case, or made affidavit or deposition, or otherwise, in regard to any of his claims which were allowed. There were one or two presented that were withdrawn, upon which he furnished one two affidavits.

I think this was upon a judgment where he had become surety on an appeal bond, in a suit brought by Collins.

The witnesses examined upon the contested claims of Rogers were Christopher, Davis, Sprague, Hughes, Gessner, and A. M. Burnham. My impression is that none of them were called by me.

Minutes of the testimony were taken by the referee, but I know nothing of them.

I can't give the language of the proposed clause or clauses in the decree which I referred to, which were stricken out, but only the fact that
32 my objections to the clauses were made in court and sustained by the judge.

The decree I refer to was the one entered June 23, 1873; at least that is the date which the copy bears.

I appeared personally before the referee, and presented these claims.

The witness is shown a copy of the report of Amasa A. Redfield, the referee in the New York suit, dated November 16, 1871, and asked to state whether or not all of the claims of Rogers, which are embraced in that suit, are enumerated in the list on pages 6 and 7 of that report, with the amounts allowed upon them, and states that he thinks they are.

The WITNESS. The allowance on draft and account of C. A. Henry, for $888.38 was made upon the draft spoken of by me, for $945.99. Also, on the same page, the allowance, $5,376 on the draft of J. W. Young & Co. was made upon the draft drawn for $22,738.79.

The several allowances appearing upon pages 6, 7 of said report, which you enumerate, were allowed upon the several checks and drafts spoken of, aside from the three claims which I have already identified.

The one for $189.80, noted here as an account of William P. Smith, was identical with a piece of paper I described as payable to the order of J. M. Mansfield for the same amount.

The one noted here as Thomas B. McGinnis for 295.06, is the same which I identified as payable to the order of Thomas B. Biggers, S. K. Dye, $311, and S. K. Dey for the same amount, are the same claims.

It was upon this allowance that I received the dividends spoken of.

Rogers appeared personally, or by attorney, before the referee, perhaps a dozen times.

I first presented the claims between February and May, 1871.

I can't say how long Rogers was here then.

I don't remember of his being here more than once with regard to this litigation.

I don't know against whom the judgments were recovered in the original suits in which Rogers had become liable as surety on the appeal bond, nor am I certain that I ever presented those claims to the referee.

I considered that my relation to Rogers, as his attorney, ceased when I accounted for his moneys, or at the time of the discontinuance of the suit I brought for him, though I have communicated with his counsel in this case, in regard to it. I have no interest in the result of the action.

Undoubtedly I saw the order of November 11th during the pend-
33 ency of that suit and while matters were before the referee. I never saw any copy but a printed one.

Redirect examination:

My best impression is that each of these pieces of commercial paper was endorsed in blank by the payees thereof, respectively.

"Q. In making proof of the commercial paper in the New York suit, &c., state if you were required to prove who the persons composing the firm of James W. Davis and Associates were?

(Objected to.)

"A. I was not.

Q. State if any objection was made in the course of that proceeding in that suit because you did not make proof of the persons composing the firm of James W. Davis and Associates, in connection with the commercial paper which you offered?"

(Objected to.)

There was a defense made against the right of Rogers to recover upon some of the commercial paper which I offered. My recollection is that all the opposition came from James W. Davis.

Counsel for William F. Durant then produced and offered in evidence a certified copy of the judgment roll in the suit brought by William F. Durant, Mordecai B. Sprague, and Pierson S. Mattox, against James W. Davis, William Ruth, and others, in the supreme court of the city, county, and State of New York, wherein the original summons was dated September 26th, 1876, and the final judgment June 23d, 1873, which is marked by the commissioner as "W. F. Durant, Exhibit A, James F. Meagher, special examiner."

(Objected to by counsel for Rogers as being immeterial and irrelevant.)

34 *Abstract of New York record.*

Summons and complaint filed in the supreme court of the city, county, and State of New York, September 26, 1870.

The summons and complaint were afterwards amended, and are as follows; The suit being brought by William F. Durant, M. B. Sprague, and P. S. Mattox, complainants, against Timothy P. Richards, James W. Davis, James H. Gessner, William Ruth, Henry C. Crane, as trustee for Wilhelmina Davis Train, composing, with plaintiffs, the firm of Davis, Sprague & Co.; James W. Davis and James H. Gessner, as copartners, composing the firm of James W. Davis and Associates; Thomas C. Du-

rant, Oliver Ames, and others, trustees, and Elizabeth Davis, wife of James W. Davis.

The complainants in the amended complaint allege that they and Davis, Gessner, Richards, Ruth, etc., were copartners, doing business by the firm name and style of Davis, Sprague & Co.

That in November and December, 1867, Davis, acting for himself and the parties named as comprising the firm of Davis, Sprague & Co., made a contract with T. C. Durant and others, trustees, for the delivery by the firm of Davis, Sprague & Co. of a large quantity of ties, lumber, and timber on the line of the Union Pacific Railroad, at certain prices and on certain conditions, as appears by memorandum of said contract attached as schedules A, B, and C to said complaint; that the business of the firm of Davis, Sprague & Co. referred to the work, labor, and material to be done, used, and furnished in the performance of said contract. States the interests of the respective parties in said contract: Mattox, one-tenth; Sprague, one-tenth; Durant, three-tenths; Richards, one-tenth; Ruth, one-twentieth; Crane, trustee, one-tenth; Gessner, one-twentieth, and Davis, one-tenth; that the parties composing the firm of Davis, Sprague & Co. duly performed the contract on their part, and the same was fully accepted by the trustees as fully performed in all respects, and the business of the firm completed and terminated.

That said firm of Davis, Sprague & Co. became entitled to large sums of money from the trustees under said contract.

That the defendant Davis has received large sums of money from said trustees, being the avails and profits of said contract so done and performed by Davis, Sprague & Co., to wit, the sum of two hundred and
35 twenty-five thousand dollars ($225,000) and upwards, which he refuses to distribute amongst his copartners, composing the firm of Davis Sprague & Co.; that without the knowledge or assent of plaintiffs, the said Davis wrongfully took the funds and profits of said firm of Davis, Sprague & Co., to the amount of two hundred thousand dollars ($200,000) and upwards, and invested the same in another and new contract or contracts with said trustees for the further delivery of ties, lumber, etc., on terms and prices unknown to plaintiffs, and in and for the benefit of a new and another firm, to wit, the firm known by the name of James W. Davis and Associates, and composed of Davis and Gessner, and other persons wholly unknown to plaintiffs; that said Davis organized the said firm of James W. Davis and Associates, and invested in said new contract the funds of Davis, Sprague & Co.; that neither the plaintiffs in this suit nor the other members of the firm of Davis, Sprague & Co. were members of said new firm of James W. Davis and Associates, or in anywise interested in said new contract or contracts with said trustees as partners or participants in the profits or benefits thereof; that said firm of James W. Davis and Associates performed the second contract, and claimed to be entitled to receive from said trustees three hundred thousand dollars ($300,000) and upwards.

That the trustees are justly indebted to Davis, Sprague & Co. under the contract aforesaid, in the sum of, to wit, three hundred thousand dollars ($300,000).

That all the money due or remaining unpaid by said trustees to said James W. Davis and Associates, under the new contract or contracts, in

truth and in fact, both in law and in equity, belongs to said firm of Davis, Sprague & Co., and that the trustees are indebted to said firm therefor, in said sum of three hundred thousand dollars ($300,000) and upwards.

That Davis is insolvent and a non-resident of New York, and is wasting and squandering the assets of Davis, Sprague & Co., and also of the firm of James W. Davis and Associates, etc., etc.

That plaintiffs bring this action for their own benefit, as well as for the benefit of all those who shall hereafter unite as parties to this action, and contribute to the expenses of the same, or who may be interested to become parties hereto, and for the benefit of all creditors who may hereafter unite in this action, or may be made parties hereto.

The plaintiffs pray:

First, for a dissolution of the partnership known as Davis, Sprague & Co., and also of the firm of James W. Davis and Associates, for an
36 accounting of both firms, and a distribution of the firm property and assets of each of said firms among the respective parties in interest.

Second, that a receiver be appointed, etc.

Third, that said receiver be directed to bring suit for, collect, etc., the assets of Davis, Sprague & Co., the assets, etc., of James W. Davis and Associates, and all sums due either of said firms from said trustees, and all other sources, etc.

Fourth, that the respective rights and interests of all the parties in the premises be fully adjusted, liquidated, determined, and settled between all the parties, and an account had of the business of both of said firms; that an accounting be had between Davis, Sprague & Co., and said trustees and J. W. Davis and Associates, and said trustees, and their respective rights settled between the said firms and parties.

Fifth, that the amount due and owing by said trustees be adjudged and decreed to be the property of Davis, Sprague & Co., and that they be adjudged to be creditors of the firm of James W. Davis and Associates, and entitled to all the benefits and privileges of creditors, with a lien upon said assets prior to the other creditors of that firm.

Sixth, that the trustees be ordered to pay to the receiver such sum as shall be found due and unpaid on account of either or both of said contracts, to be held as part of the assets of Davis, Sprague & Co.

Seventh, that said trustees, etc., be restrained from paying any money to Davis or his order, etc., or to J. W. Davis and Associates, etc.

Eighth, that Davis be restrained from doing anything in and about the business of Davis, Sprague & Co., or J. W. Davis and Associates, or receiving or disbursing any funds; and that the plaintiffs and such other parties who shall duly show their interest or equity in this action, may have such other or further relief as to the court shall seem fit, and the costs of this action.

Subscribed and sworn to by M. B. Sprague and W. F. Durant.

"Schedule A" is a proposition, dated November 19, 1867, at Cozzens' Hotel, Omaha, addressed to S. B. Reed, supt. &c., or committee, and proposes to furnish a million ties, at different prices, according to the different points of delivery on the Union Pacific Road, if the prices are satisfactory, the details of the contract, &c., may be arranged at once, and security given for its performance.

(Signed) "James W. Davis, for self, Sprague, and others."

P. S. "Will furnish you timber, twenty-five (25) feet in length
37 and under, delivery at a convenient point west of Sanders, for forty dollars ($40) per M."

(Signed) "James W. Davis, for self and Associates."

"Schedule B," dated Omaha, November 20, 1867, addressed to J. W. Davis and Associates, is an acceptance of the proposition, stating the terms and conditions, etc., signed by Sidney Dillon and T. C. Durant, committee, with an approval endorsed by H. C. Crane, secretary, December 3, 1867.

"Schedule C" is a contract, finally entered into between J. W. Davis, for himself and others, party of the first part, and H. C. Crane, secretary, for trustees, party of the second part, and provides for the delivery of a million ties, at certain points, for specified prices; for the purchase by Davis and others, of the outfit of the company at Sanders, a certain saw-mill, for the delivery of hewn timber at forty dollars ($40) per M., etc., etc., and closes, "In witness whereof the parties have signed and sealed these presents.

"H. C. CRANE, *Secretary for Trustees.*
"J. W. DAVIS, *for Self and Associates.*"

Order of injunction, according to the prayer of complainant, September 28, 1870.

Order appointing Francis M. Bixby receiver, with the usual powers, etc., September 28, 1870.

Joint answer of Davis and Gessner admits the making of the contract stated in the complaint, and says that the same was made by him in expectation that others would be associated with him in the execution of said contract, but that it was then undetermined who such persons should be, and what interest each should hold therein; that afterwards Durant, Sprague and others acquired the interest stated in said petition, but that Davis had two-tenths, and Mattox never had any interest; that no firm name of said parties was ever agreed upon or adopted by them, but they at first assumed the style of Davis, Sprague & Co., and in their dealing with all parties, save the trustees, they for a long time used that style, but the trustees from the first kept their accounts in the name of James W. Davis and Associates; that the two names of Davis, Sprague & Co., and James W. Davis and Associates described, and does yet, one firm and set of parties only; and there never was but one firm; denies the improper receipt of money by Davis from said trustees, or that he ever received, except as the duly authorized agent, etc., of the parties, as well when acting in one as when acting in the other of said firm names; that defendant
Davis, has never wrongfully, etc., taken the assets or funds of Davis,
38 Sprague & Co., and invested the same in the name of his wife; but says that by reason of divers services by him rendered in and about said business, he became and was entitled to have from it large sums of money.

That a part being paid to him by said firm, he invested the same in the name of his wife, as he had a right to do, and that neither he nor his wife are in any way liable to said firm, or any member or creditor thereof, for the same or any part thereof; denies Davis' insolvency, etc.

Subscribed and sworn to by Davis.

Answer of the seven trustees, who say that they have no knowledge or information sufficient to form a belief as to the existence of a partnership under the name of Davis, Sprague & Co., etc.; admit the making of the contract with Davis, who professed to act for himself, M. B. Sprague, and others unknown to the trustees; admit that said contract has been performed, and large sums of money earned under it, but have no knowledge as to whether Davis has appropriated the proceeds, or refused to divide with his partners, etc.

The defendants admit that after the contract had been performed by Davis, and after he had received payment from these defendants for all the work done and materials furnished pursuant to the same, he, the said Davis, did furnish and deliver other ties, lumber, and materials to these defendants, from time to time, at prices specified and agreed upon between them, with respect to each particular delivery of such material, but that all have been fully paid for, except as hereinafter mentioned.

These defendants further say that afterwards, and about the day of , 1868, said Davis offered and proposed, on behalf of himself and his partners or associates, to sell and deliver to these defendants, as trustees, ties and lumber at certain prices fixed and agreed upon to an amount somewhat exceeding two hundred thousand dollars ($200,000), which proposal was accepted; that Davis proceeded to prepare and cut out a large lot of ties, etc., for delivery under said proposal, and the trustees have been ready and willing to accept the same and pay the stipulated price whenever the delivery should be completed; but that the delivery has not been completed in consequence of legal processes issued against him for the collection of debts; deny that they owe anything for ties, lumber, or materials sold and delivered by Davis to them at any time, but that he has been overpaid; deny that Davis, for himself or for any associates, made any contract with them subsequent to the contract first mentioned, except the sale and delivery of particular lots of ties and materials as above mentioned, and the offer and acceptance of other materials which is incomplete, as stated; deny any knowledge as to whether
39 Davis wrongfully invested the funds of the firm of Davis, Sprague & Co. in the name of his wife, or has wasted the property of the firm, etc., and ask for an account, etc.

Sworn to by Sidney Dillon and T. C. Durant, October 27, 1870.

Order appointing A. A. Redfield referee, and referring to him all the issues in the action as sole referee to hear and determine the same, and also to take and state an account of all claims justly chargeable upon the fund in question in this cause, as well in favor of any and all of the parties hereto, as also in favor of creditors of the respective copartnerships named in the pleadings; that all books, papers, and so forth relating to the questions in this cause be placed subject to the order of the referee, and open to the examination of the parties.

Order of November 11th, counsel appearing for all the parties, by which it is ordered that all persons, parties, and corporations having claims against the firms of "Davis, Sprague & Co." and "James W. Davis and Associates," or either or both of said firms, present the same, together with their proofs, in support of the validity thereof, to the referee, &c.; that any claim against either of said firms not so presented shall be ex-

cluded from participation in the fund in question, &c.; also provides for publication of order.

Report of referee, dated November 16th, 1871. The referee reports that having been ordered to take and state an account of all claims against the fund, as well in favor of all the parties as also in favor of the creditors of the respective copartnerships, &c., that he has been attended by the parties hereto and their counsel, and the following-named creditors in person or by their counsel, and he has duly considered all the allegations and proofs of the parties and said creditors and their counsel, and finds, as matters of fact, that certain persons and firms have duly presented and proved before me the claims in the amounts set opposite their respective names; that said claims and each of them are justly chargeable upon that part of the fund which may be found to be due and owing from the trustees to Davis & Gessner for all work, &c., outside of and not relating to the million-tie contract, or which shall in any wise pertain or relate to the work done west of Elk Mountain, and not embraced in or covered by the million-tie contract.

Then follows a list of claims, allowed as "Class I," against James W. Davis & Associates, on pages 89, 90, and 91. Amongst those of the first class are:

The First National Bank of Omaha.
E. W. Winter.
G. H. and G. S. Collins.
40 Kountze Brothers & Co.
T. C. Brush.
T. S. Wilson.
W. W. Corlette.
W. R. Steele.
C. B. Sprague.
William Ruth.
Cornelius Christopher.
Benjamin F. Bunker.
A. C. Amer.

And also twenty pieces of commercial paper allowed in favor of Henry J. Rogers, which were issued to or accepted in favor of the following parties:

C. A. Henry	$888 38
J. W. McIntyre	200 00
F. Haggerty	388 45
T. C. Brush	99 35
J. W. Young & Co	5,376 00
H. Robinson	157 05
Wyatt & Jones	1,038 02
A. H. Hyett	71 69
H. J. Rogers & Co	232 80
Daniel McQuillan	314 13
M. V. Lee	138 55
Daniel McQuillan	300 00
Thomas B. Higgins (Biggers)	295 06
William P. Smith (Mansfield)	189 80
Samuel Hanse	100 00

J. M. Mansfield	638 96
H. J. Rogers & Co	584 52
R. S. Van Tassel	2,188 54
W. W. Corlette	250 00
S. K. Dye	311 00

That certain persons and firms have presented and proved claims which are properly and justly chargeable on that part of the fund to be found due and owing from the trustees to the parties associated in the million-tie contract, amongst whom are:

Crerar, Adams & Co.
Hall, Kimbark & Co.
B. F. Bunker.
C. Christopher.
41 A. C. Amer.
A. M. Burnham.

That those claims embraced in Class I, of the report, are not properly chargeable to the parties associated in the million-tie contract. The referee also finds, as conclusions of laws:

First. That the associates in the million-tie contract, Durant, Sprague, Mattox, Ruth, Richards, Crane, &c., are not liable for the claims embraced in Class I, of the report.

Second. That such fund as shall be found due from the trustees, as relating or pertaining to the work done west of Elk Mountain, but not embraced in or covered by the million-tie contract, should be applied to the payment of the claims embraced in Class I, together with such sum as shall be found upon an accounting, to be due from Davis & Gessner to their associates in the million-tie contract, equally, or pro rata.

Third. That such funds as shall be found due from the trustees, or otherwise relating to the million-tie contract, should be applied to the payment of the claims embraced in Class 2 of the report, equally, or pro rata.

Report of referee, dated June 7th, 1873, finds as matters of fact:

First. The several matters already set forth in his previous reports, to which reference is made.

Second. That the profits realized by the associates under the million-tie contract, and which came into the possession of James W. Davis and James H. Gessner, from the trustees, &c., amounted to two hundred and twenty-five thousand dollars ($225,000).

Third. That there is due from said Davis & Gessner, to their associates in the million-tie contract, the sum of two hundred and twenty-five thousand dollars ($225,000), being the profits of said contract expended and disbursed by Davis & Gessner in work done or materials furnished west of Elk Mountain, and outside of said million-tie contract.

Fourth. Makes certain additions to the list of creditors in Class I of his report in favor of Augustus Kountze; also finds as a conclusion of law, first, that Davis & Gessner are indebted to their associates in the million-tie contract in the sum of two hundred and twenty-five thousand dollars ($225,000), being the profits of said contract expended and disbursed by Davis & Gessner in work done, and so forth, west of Elk Mountain, and outside of the million-tie contract, for which sum said associates in said million-tie contract are entitled to judgment against Davis & Gessner.

42 Final decree in conformity with the reports of the referee as follows:

"Supreme court, city and county of New York.

"WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
"*ag'st*
"TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, Henry C. Crane, trustee for Wilhelmina Davis Train; John Doe, Richard Roe, and Susan Doe; John Brown, William Brown, and Sarah Brown; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, Elizabeth Davis, wife of James W. Davis, and others, defendants.

"Final judgment June 23rd, 1873.

"This cause having been referred to Amasa A. Redfield, esq., to hear and determine the same, and the said referee having made several reports herein, dated, respectively, November 9th, 1871, November 16th, 1871, and March 14th, 1872, and the same having been duly filed, and the said referee having made his final report herein, dated June 7th, 1873, and the same having been also duly filed:

"Now, on motion of Clark Bell, attorney for plaintiffs, after hearing D. W. Gillett, of counsel for Davis and Gessner, and L. L. Kellog, esq., of counsel for trustees, and Wm. E. Stiger, of counsel for Henry J. Rogers:

"It is ordered, adjudged, and decreed that the said reports be, and that the same are in all respects hereby, ratified and confirmed; and it is further adjudged, ordered, and decreed that on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant James W. Davis, at the city of New York, made a contract in writing with the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, &c., parties of the second part, for the delivery, by the said James W. Davis and his associates unto the said parties of the second part, of a large quantity of railroad ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices, and upon certain terms and conditions, a copy of which contract is annexed to the complaint in this action.

"That subsequently, and at various times between the 20th day of November, 1867, and the 20th day of November, 1868, the said Davis, for a valuable consideration to him paid, assigned proportionate interests in the profits and business of the said contract to, and associated with himself in the performance of said contract, certain parties, to wit, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P.
43 Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train.

"That said assignments are fully set forth in the report of the referee herein, bearing date November 9th, 1871.

"That the said parties owning said several interests prosecuted the work of making and delivering the ties, timber and lumber, so far as aforesaid contracted to be delivered, and did, between the 20th day of November, 1867, and the 1st day of January, 1869, deliver to the said defendants, Durant and

others, trustees as aforesaid, one million ties and feet of lumber and timber, for which the said trustees became indebted to the said parties so associated in the performance of the contract first above mentioned, on account of which indebtedness the said trustees have paid to the said associates large sums of money, from time to time, as the work under said contracts progressed.

"That a profit was realized by said associates for the work done and materials furnished under said million-tie contract, and in the business connected therewith, of the sum of two hundred and twenty-five thousand dollars ($225,000).

"That the said sums of money, so received from said trustees, on account of such indebtedness, came into the possession of the defendants, James W. Davis and James H. Gessner, two of said associates, and were by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and material specified in the contract set out in schedules A, B, and C, annexed to the complaint herein, and known as the million-tie contract.

"That for such work done and materials furnished, the said trustees became and are indebted unto the said James W. Davis and James H. Gessner.

"That the sums of money received from the trustees on account of the first above-mentioned contract, and belonging to the first above-mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of the plaintiffs, or any of said associates besides said Davis and Gessner, and that none of said associates, except said Davis and Gessner, were associated in the said business, done and transacted by Davis and Gessner, outside of said first named contract, or were in anywise interested therein as partners or participants in the profits or [illegible]ts thereof.

44 "That all of the said work so done by the said Davis and Gessner, outside and not relating to the contract set forth in the complaint in schedules A, B, and C, and known as the million-tie contract, was done along the line of the Union Pacific Railroad, at points westward of the point known as Elk Mountain, and that the business so done at the points west of Elk Mountain was done by the said James W. Davis and James H. Gessner in the name and under the style sometimes of 'James W. Davis and Associates,' and sometimes in the name and under the style of 'James W. Davis, trustee.'

"That the work done and performed and materials furnished in the execution of the contract set out in the complaint, in schedules A, B, and C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific Railroad, at points eastward of a point known as Elk Mountain, and that their relation was as is set out in the certificates set forth in said report.

"That no partnership existed at that time and no articles or agreement of partnership were ever made between the parties in interest in the said contract, known as the million-tie contract; that the transaction was a special venture in which the various parties held respectively the several

interests or shares mentioned and specified in the report of the referee herein, dated November 9th, 1871, and that no articles of partnership were ever made between the said James W. Davis and James H. Gessner, in relation to the work done west of Elk Mountain.

"That the parties, so as aforesaid associated in interest in the million-tie contract, became and were the owners of a large quantity of ties, lumber and timber, and other materials in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

"It is further adjudged that the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, are indebted, under the contract of settlement referred to in the report of the referee herein, bearing date March 14, 1872, to James W. Davis and his said associates, in the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872, the said sum being the amount due from said trustees to said James W. Davis and said associates, or to any of them individually, arising out of said million-tie contract, or the second contract for work done and materials furnished west of Elk Mountain; and that such payment, by the said trustees, shall be a release to them of all liability on their part by reason of the service upon them of the trustee process.

"It is further adjudged that said James W. Davis and his said associates do recover of the said trustees the said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14, 1872, and that the same be paid into the hands of the receiver heretofore appointed in this action, to be disbursed by him as hereinafter directed.

"It is further adjudged that there is due to the associates of said Davis & Gessner in the million tie contract, and that they do recover from James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000), being the amount of profits realized by said associates for the work done and materials furnished under said million-tie contract and in the business connected therewith, and used and expended by said James W. Davis and James H. Gessner without the knowledge, privity, assent, or concurrence of any of the associates in said million-tie contract, except Davis and Gessner, in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and materials done and furnished under the million-tie contract.

"It is further adjudged that all persons, parties, and corporations named in clauses one and two of the report of the referee herein, dated November 16th, 1871, having appeared, filed their claims, and proved the same before the referee, and the same having been adjusted and reported by the said referee, shall be considered as adjudicated upon as to the amounts claimed by them respectively.

"That those claims so enforced in clause one of said report of November 16th, 1871, are not chargeable to the parties associated in the million

tie contract, or to any fund that may come into the hands of the receiver herein, belonging to said contract.

"It is further adjudged that said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), and interest from March 14th, 1872, found due from said trustees to James W. Davis and Associates. and to be paid into the hands of the receiver herein, shall be disbursed by the said receiver as follows, viz:

"1st. He shall pay the fees of the referee herein.

"2d. The costs of the parties, as taxed by the clerk herein, viz: to Clark Bell, esq., the attorney for the plaintiffs, the sum of two thousand four hundred and three $\frac{78}{100}$ dollars for his costs and disbursements, together with the sum of three thousand dollars as additional al-
46 lowance under § 309 of the code; to the attorney and counsel for the defendants Davis and Gessner, the sum of five hundred and eighty $\frac{20}{100}$ dollars for their costs and disbursements, together with the sum of three thousand dollars as an additional allowance, as aforesaid; and to the attorneys for the said trustees, defendants, the sum of two thousand and sixty-four $\frac{5}{100}$ dollars, being their costs and disbursements, together with the sum of fifteen hundred dollars as additional allowance to them, as aforesaid, under said section of the code, all of which are to be so paid out of said fund.

"3d. The balance of said fund to be distributed pro rata among the persons, parties, and corporations named as creditors in clause one of the report of the referee herein, dated November 16th, 1871, and the associates of James W. Davis, under the million-tie contract.

"The basis of calculation being the amounts found due said persons, parties, and corporations respectively, in clause one of said report of November 16th, 1871, and the amount found due said associates in the million-tie contract, as hereinbefore set forth, viz, $225,000.

"It is further adjudged that the receiver herein shall retain possession of the amount or share due to the associates in the million-tie contract, as last above provided, and distribute the same pro rata among the persons, parties, and corporations mentioned in clause two of the report of the referee herein, dated November 16th, 1871.

"Enter. (Signed) D. P. I."

DANIEL W. GILLETT, being produced and sworn as a witness for complainant, on the 23d day of November, 1876, testified as follows:

Am 43 years of age; an attorney, and reside in New York City.

I know the plaintiff Rogers.

I was connected with the New York suit brought by Durant and others, against Davis and others, in 1870, acting as counsel with Mr. Woolworth, of Omaha, who was the attorney of record for Davis & Gessner.

I recollect of an order being entered in that case, authorizing claimants against the parties furnishing ties to the U. P. R. R. Co., to present their claims for participation in the fund due to the tie contractors.

I know that Rogers presented sundry claims under that order, and that opposition was made to his claims by my client, Mr. Davis.

I don't remember of any written pleadings being filed by Rogers,
47 nor do I know of any notice or summons being served upon Rogers to present his claims, except the order of November 11th, to claimants.

I remember generally that Rogers presented certain drafts, drawn by Davis, Sprague & Co., or Davis & Associates, I don't remember which of those names, exactly drawn on the First National Bank of Omaha, which were cashed by Rogers, as he claimed and testified, while acting as a banker at Cheyenne.

He presented also, I remember, a claim for certain moneys he had paid, and was liable to pay, on some bond he had given in some litigation brought against the contractors for ties. My impression is that was all thrown out by the referee.

I have no memorandum of Rogers' claims. Rogers' proof consisted of the notes and drafts, and some certificates from the county clerk as to the bonds. Also, his testimony on each claim, and the evidence of Christopher, and, I think, some other witnesses. My impression is that it was a Mr. Crary. Perhaps it was Mr. Hughes.

The judgment-roll you now show me, marked W. F. Durant, Exhibit A, &c., is the judgment-roll of the suit to which I refer.

The order of November 11th is the one under which Rogers presented his claims.

That was the only order which was made in regard to presentation of claims.

I am the D. W. Gillett whose name appears in that roll as counsel for Davis & Gessner.

The referee's report of November 16, 1871, in that judgment-roll, embraces the claims offered and proved by Rogers.

I don't know how his paper was endorsed. I think that I alone contested Rogers' claims on behalf of Davis. Clark Bell did not.

The complainant's attorney in that suit took part in the proceedings in reference to the claims which we made against the fund, and advised and acted in concert with me in contesting the claims made in that action against that fund, under the order of November 11th.

The issues made on Rogers' claims were as to the validity of these obligations; the consideration received by the contractors, for which the paper was given, and the question as to whether or not Rogers had paid them, it being claimed in several cases by Davis that the paper alleged to be in Rogers' possession, had not paid by him; in other words, that he held it as an agent, and was not the owner, as he claimed to be.

48 As to the bond the defense was that he had not paid, and could not sue to recover until he had paid. It was an appeal bond as I remember. It was rejected by the referee.

I diminished the amount of Rogers' claim as originally made. I don't know of any other issue between Rogers and the contractors.

I don't know of Rogers offering any proof as to who composed the firm of James W. Davis & Associates.

The order of November 11th was made at the instance of plaintiff's attorney.

"Q. Was any opportunity offered to Rogers to take part in the litigation between the tie contractors of the U. P. R. R. Co. who appeared in that case, and the trustees of the R. R. Co. or between the tie contractors inter sese as to the composition of the partnership of James W. Davis & Associates?

(Objected to.)

"A. I know of none save the opportunity to be a witness. I think he was sworn in a case, but that was on the main issue, and what his evidence was I don't remember. I don't know whether he swore it was Davis, Sprague & Co., or Davis & Associates, there were so many witnesses back and forth."

There were a great many other claimants against the contractors, besides Rogers. I don't know of any that attempted to show who composed the firm of Davis & Associates.

I filed an answer on behalf of Davis & Gessner in that suit.

"Q. State what you stated in your answer upon the subject of the persons who composed the firm of James W. Davis & Associates?"

WITNESS. Mr. Woolworth prepared the answer before I ever heard of the case. The point that we made was that the two firms, Davis, Sprague & Co. and James W. Davis & Associates were one and the same concern.

I had no information as to who composed the firm of Davis, Sprague & Co. and Davis & Associates, only as I received it from the various parties as to their belief, and also from certificates given by Davis to various parties as to the extent of their interest in the association or firm, which were introduced in evidence. I don't know what persons thus appeared to be partners in those two firms. That is the very thing we contended for.

Cross-examination:

My recollection as to the conduct of this case is not fresh and distinct.

49 The bond on which Rogers presented a claim before the referee was an appeal bond on a judgment obtained by some parties out West against some of the tie contractors. I think Collins was the plaintiff in that suit.

It was called the "Collins bond," I think.

I don't remember that any of the persons who presented claims before the referee filed intervening petitions, or any written pleading describing their claims.

I have forgotton exactly as to the proof which Mr. Rogers offered.

The main contest in the New York suit was as to whether or not the plaintiffs therein, together with all of the defendants, except the trustees of the Union Pacific Railroad Company, were one firm throughout, or as to whether all of them, except the said trustees were partners in the contract for furnishing ties to the amount of about one million, and that only Davis & Gessner were interested in the contract under which the balance of ties was furnished, together with the other issue as to amount of money due either fund from the trustees.

In order to ascertain what amount each person proving a claim before the referee would be entitled to receive, it was a prerequisite to prove which firm was owing the claim, if there were two firms.

The question as to whether or not William F. Durant was a member of the firm holding the million-tie contract only, or a member of the firm which furnished the balance of the ties, over and above said contract, was especially contested in that suit, and testimony was taken on all those questions before the referee appointed in that suit, at great length.

It was also an issue in that suit, and on which testimony was taken, as

to whether or not William F. Durant was liable upon any indebtedness of any other firm than that of Davis, Sprague & Co.

There were parties who presented claims before the referee against both of those firms, which appeared in the court report of the referee.

The creditors of Davis, Sprague & Co. received a greater dividend than those of James W. Davis & Associates.

My recollection is that all of Rogers' commercial paper purported, on its face, to be that of James W. Davis & Associates.

I do not remember whether or not Burnham testified on Rogers' claims. Rogers testified personally upon the matter of his claims on two occasions at least.

Some of the claimants testified as to who composed the firm of
50 James W. Davis, as witnesses on the main issue, but not in presenting these claims.

Redirect examination:

Q. "State if in adjudicating upon the question of the relative interests of the various persons who were tie contractors, the claimants against them in that suit were heard or represented."

(Objected to.)

A. "No."

WITNESS. What I call the main issue in the case, was the question as to whether the firm of Davis, Sprague & Co. was ended upon the completion of what is known as the million-tie contract, or whether it continued under the new name of James W. Davis & Associates for work done beyond the million-tie contract, and upon that issue the creditors were not heard, except as witnesses, the same as others.

Rogers appeared in that action as a party only to prove his claims against the tie contractors.

He offered proof to show what the original consideration was for the commercial paper which he presented.

The referee made four reports, which are all in his judgment-roll, save the Burnham special claim, which I don't see.

The referee did not make a decision as to the composition of the firms of the contractors anterior to the proving up of the claims of Rogers.

"Q. Was not the main issue conducted entirely independent of the proving up of the claims of the creditors?"

(Objected to.)

"A. It was.

"Q. Had the issue in that case, so far as Rogers was concerned, any further scope than to determine how far he might participate in the fund due from the trustees of the road to the tie contractors?"

(Objected to.)

"A. I think not."

I think the creditors of Davis, Sprague & Co. received a dividend of about eighty per cent., and those of James W. Davis & Associates, between fifteen and sixteen per cent.

51 Whereupon the cross-examination of Mr. Gillett was suspended, and

HENRY C. CRANE, being produced as a witness on behalf of complainant, on the 23d day of November, 1876, at New York, testified as follows:

I never was secretary for the trustees of the Union Pacific Railroad Company, but was for the trustees who built a portion of it.

I have seen books purporting to be those of the tie contractors. I can't say whether Davis & Associates or Davis, Sprague & Co.

They were the books of the tie contractors, I suppose.

Those books are in No. 20 Nassau street, in the second room from the one in which I am giving this deposition.

They are there in trunks, locked up, which I suppose you might break into.

I don't know who has the key of the trunks, or who is the custodian of them. They are not in my office, but in Thomas C. Durant's, a brother of William F. Durant.

I have no authority to produce those books.

Thereupon the taking of testimony was adjourned to the office of T. C. Durant, No. 20 Nassau st., and the examination of the witness Crane then and there resumed by Mr. Whitney, counsel for complainant Rogers.

The WITNESS. I believe the books which you designate as those of Davis & Associates, or Davis, Sprague & Co., or the tie contractors for the Union Pacific Railway, to be those trunks there in this room, which I find, after examining them at your request, to be locked.

I don't know who has the key, nor who is the custodian of the trunks, nor have I any authority to produce the books.

I have paid drafts made by Davis, either for himself, or as Davis & Associates, or something of the kind, but most of the payments were made on the line of the road by the cashier of the contractors.

The receipts for money paid by the trustees to the tie contractors may be in my possession, but I am not certain. I have lost vouchers that were sent me from the West, and have never examined among my papers for them. I think I can examine and ascertain.

Cross-examination:

I did not place the books, concerning which I have been questioned, in these two trunks, although I saw them placed there.

52 I don't know whether they are there now or not, though I believe they are. They were put there by Mr. Bunker.

The witness is requested, on behalf of William F. Durant, that in case he produces the papers called for by Mr. Whitney, to produce in addition thereto all papers generally bearing on the subject, in addition to what may be called for by Mr. Whitney.

HENRY C. WHITNEY, being sworn on behalf of complainant, at New York, November 23, 1876, testified as follows:

I am the attorney for the complainant in this suit, and just learned where the account books of the tie contractors were on the 20th of November instant, here at New York.

I have made diligent inquiry since ascertaining that fact, to ascertain who the custodian of these books is, and to that end have examined Henry C. Crane, A. A. Redfield, the referee, F. M. Bixby, the receiver, and have tried in vain to find B. F. Bunker, the clerk of the receiver, and cannot ascertain who is the custodian of those books, or who has the key to them.

(NOTE.—Mr. Bixby was not examined as a witness.—JAMES F. MEAGHER, *Special Examiner.*

I hereby notify William F. Durant and his attorney, Charles H. Lawrence, both of whom are present, to produce those books here for examination.

Cross-examination:

I presume that neither William F. Durant nor his counsel have any custody or control over said books.

I don't think that either you or your client have any custody or control over the books. I simply give the notice pro forma, and nothing more.

Whereupon the redirect examination of Mr. Daniel Gillett was resumed by Mr. Whitney, on the same day:

I frequently saw the account books of the tie contractors.

I don't recollect by what name the accounts in these bonds were kept.

"Q. Was there any break in the continuity of these accounts from the beginning to the end of them?"

(Objected to.)

53 "A. We claimed there was none."

There didn't appear to be any closing up of the books at any time during the furnishing of ties, and the commencement of accounts in a new name.

I don't remember what period of time these books covered, but it purported to cover the entire period during which ties were being furnished by the contractors.

I don't remember that the accounts contained in those books were kept in the same name from beginning to end.

Recross-examination:

Only one of the claimants attempted to be made a party to the suit, or offered to file an intervening petition, and that was Christopher.

I remember that an adjournment of the testimony was had in order to enable Rogers to produce his testimony.

Rogers presented his claims after the order of November 11th was granted, and after it had been published out West in the papers specified in the order.

I don't know, of my own knowledge, that Davis carried on the business of furnishing ties after the expiration of the million-tie contract with funds which had come into his hands under that contract, but it was so charged by the plaintiffs, and testimony was taken upon that point in the case, and it was passed upon by the referee.

The certificates of interest in the contract, which I referred to in my testimony-in-chief, appear in this judgment roll, William F. Durant, Exhibit A.

By Mr. WHITNEY: Christopher attempted to be made a party by motion before the court, which I had nothing to do with.

Mr. Bell resisted it, and told me he defeated Christopher on it.

AMASA A. REDFIELD, being sworn on behalf of complainant, at New York, November 23, 1876, testified as follows:

Live in the city of New York; am 40 years of age; am a lawyer by occupation.

I remember the New York suit brought by Durant and others against Davis and others.

54 I was appointed to take the testimony, and hear and determine certain issues raised in the case.

The document marked "W. F. Durant, Exhibit A," &c., purports to be a judgment roll of that case. It is so long since I have seen the complaint in that case that I can only state my recollection to be that the gravamen of the suit was to determine the partnership relations existing between the different parties, and also to have determined the names of and amounts due the creditors of the various parties in the suit, forming one or more copartnerships.

I remember the order of November 11th, though not its precise terms. This is it in the judgment roll. I recollect of no other on that subject, nor any notice to creditors than is contained in that order.

Very many claimants presented their claims, and had them adjudicated under that order.

No written pleadings were filed, or sought to be filed, by any claimants, except a verified statement of their claims, which was then submitted to the counsel for either party to the action to state their objections.

If objections were made they were required to state them to the referee, and oral proof was then entered into by the creditor and objecting party respectively.

"Q. In determining the issues in that action which arose between the tie contractors inter esse, or between the contractors and the trustees of the Union Pacific Railroad, were the claimants against the tie contractors called upon to take any part?"

(Objected to.)

WITNESS. Several claimants insisted, as I remember, to be heard on the question of the amount due by the railroad company to the tie contractors, and were examined as witnesses. They also took some part in the question whether or not their claims were against the tie contractors, or against some other firm composed of some or all of the same contractors.

Their action in the matter was somewhat informal, and I don't recall precisely what was done.

I remember Henry J. Rogers, who was represented by Mr. Stiger.

Christopher was also a claimant, and took, I think, the most active part of any.

The evidence taken before me in this whole proceeding was reduced to writing by me, and was in my office till after I had delivered the final report.

55 Shortly after that I was absent in Europe for some months, and since my return have made diligent search for the minutes, and have been unable to find them. I believe they must have been delivered to one of the counsel in the case. It was not necessary that the minutes should be filed with the court.

I remember that Mr. Stiger filed a number of notes and checks and evidences of indebtedness.

I have no other memorandum of them than may appear in my report as filed.

I have no doubt that the list of claims shown in my report embraces

those offered by Rogers, nor that the documents submitted to me by Mr. Stiger were the documents which are embraced within the list.

To the best of my recollection, those evidences of Rogers' claims were given to B. F. Bunker, who was during the reference acting in a manner as my clerk, afterwards as clerk for the receiver. I think I have Bunker's receipt for all those papers signed by him for Bixby, as receiver. I don't know what ever became of those documents ultimately.

I think Stiger has applied to me for them within the last year, but I don't think he did before that, although I may be mistaken. Don't think he got them from me.

"Q. Did the claimants have anything to do as parties in the hearing before you, in the adjudication of the question as to who composed the firm of James W. Davis & Associates, or were they confined simply to a proof of their claims?"

(Objected to.)

WITNESS. As I recall the fact, when it became evident that only a part of the claimants could participate in the fund coming to the tie contractors and others, taking their dividends out of some other part of the fund, there was an attempt upon the part of these claimants to bring themselves within the right to claim under the larger fund so as to obtain a greater dividend, the point being that their claims arose in some way out of the work done, either east or west of Elk Mountain, and that in that way the question as to who were responsible for the work done either side of this mountain became known to them.

The claimants were allowed to offer proof tending to show who composed the firm of James W. Davis & Associates, or what persons held themselves out to the world in general, or to these claimants themselves, as such.

I remember that Christopher was offered by the claimants as a
56 witness upon that subject, and Mr. Gessner and, I think, one or two others were called upon to show declarations of the different tie contractors that they continued to be interested in the work west of Elk Mountain.

I don't remember that Rogers offered any testimony upon this point.

The reference was not conducted in accordance with very strict rules of law as to admission of evidence, as I desired to let every man have his say, there being no objection on the part of the attorneys of the parties.

I think some of the claimants, under the order of November 11th, testified as to the main issue between the partners inter esse, and between the partners and the trustees of the railroad, although I recall only the name of Christopher.

The witness is asked to state, as an expert, the practice in New York on the subject of bringing to the notice of defendants in New York courts the matters to be adjudicated in any suit.

(Objected to.)

The issue being joined by the pleadings, the only other notice that I know of is a notice of trial either before the court or referee to whom the issues may have been referred.

Suits in this State are commenced by summons, with the complaint served or not served. If the complaint is served with the summons, the defendant has notice by the complaint. If it is not served, the summons contains notice that the complaint is or will be filed by the county clerk.

In this New York suit the judgment roll shows that the complaint was served with the summons.

I think the main issue in this case was substantially tried before the question of the rights of different creditors was entered upon.

My recollection is that the first meeting before me was at my private residence in the evening, at which Mr. Clark Bell was present for the plaintiffs, and Mr. D. H. Gillett for the defendants Davis & Gessner and Dr. Burnham. The first testimony taken was in reference to a claim of Burnham.

I am not willing to state positively, for I have no distinct recollection, but my impression is the rights of the parties between themselves and their claims against the railroad were substantially adjudged before the claims, or any great portion of them, were commenced, but I do remember that there were one or two claims allowed to be proved as a matter of convenience, on the ground that the claimants were about to leave the city.

57 One was Dr. Burnham's, although the proof was not completed in it till subsequent to the order of November 11th.

I don't think Rogers' claims were amongst those which were considered first.

I can't state positively as to any but Burnham's claim.

I had no authority under the order of reference to change the parties to the proceeding.

Cross-examination:

Counsel for complainant admits that complainant had actual notice of the order referred to in the judgment roll requiring creditors to present their claims, and acted under that order.

I remember that Rogers filed a statement setting out his demands or claims, but I cannot produce it.

My recollection is that it was a list of notes, checks, and perhaps a running account for money loaned, verified by his affidavit, or some one who had personal knowledge of the facts.

Rogers appeared and testified before me in person on the subject of his claims, and that is the only deposition, other than his formal affidavit, that I now recollect.

I recollect that among Rogers' claims were two instruments showing the names of Van Tassel and J. H. Young, respectively, as parties in some way to whom money had been advanced on the paper, and that Davis & Associates opposed the claim on the ground that the paper was held as collateral; or some such opposition was made.

I can't state that I remember it to be a fact that but $5,376 was allowed on the large draft, although my impression is, decidedly, that I decided in favor of Davis against Rogers.

When I stated in direct examination that some of the claimants insisted on being heard upon the partnership question, and the amount due the tie contractors, I meant by the contractors those who were interested with Davis in furnishing ties.

I believe I stated that those claimants who desired it had an opportunity of being heard upon the question as to what parties to the suit were interested in furnishing ties, beyond the million-tie contract.

After I had made up my account with the parties interested in the

million-tie contract, who were not, all of them, interested in the work west of Elk Mountain, as I understood it, it became necessary to deter-
58 mine the creditors of these different parties, the ones doing the work east and the ones doing the work west of Elk Mountain.

The testimony taken upon the two main issues, and also upon the various claims, was heard as best suited the convenience of the parties offering testimony.

The claimants, or creditors, were heard from time to time, though not finally passed upon until the main question was decided.

I don't remember when Mr. Stiger applied for the redelivery of this paper. I think, though, a year after I had decided the suit.

It was a point strongly contested in the case on the part of those persons who had claims for work done and material furnished west of Elk Mountain, or claims based on paper showing on its face that it was given by James W. Davis and Associates, that the persons engaged in furnishing ties to the railroad west of Elk Mountain comprised all those who were parties to or interested in the million-tie contract.

I know that Davis, and I think Gessner, claimed that the work done west of Elk Mountain was by the same parties who were interested in the million-tie contract, and that all the debts should be proved generally, and that many of these creditors united in the claim of Davis and Gessner.

Christopher was prominent in endeavoring to establish that claim.

There was a claim before me by the firm of Davis, Sprague & Co. against the firm of James W. Davis & Associates, representing, respectively, the parties doing the work east and west of Elk Mountain, and I found that the firm of James W. Davis & Associates was indebted to Davis, Sprague & Co.

The claims against the parties furnishing ties were divided into two classes, those against Davis, Sprague & Co., the million-tie contractors, and the rest against the parties doing the work west of Elk Mountain.

In this judgment roll, clause number two contains names of creditors against Davis, Sprague & Co.; clause number one, against James W. Davis and Associates.

I remember a claim presented by Rogers before me based upon a liability incurred by him as surety on an appeal bond in a suit where judgment had been recovered against some of these parties in the west.

As I stated before, the claims of creditors were taken up at any time to suit the convenience of themselves or counsel, and it is quite likely that testimony may have been given as to the relations of the parties after Rogers' claims were filed.

59 The claims were not definitely passed upon, allowed, and reported by me until after the settlement of the questions of partnership which arose in the case.

If any of the claimants had asked to be sworn to testify before me, as to any of the rights of the parties between themselves, I think, under the peculiar circumstances of the case, that I should have admitted the testimony, no objection being made by the counsel.

A great part of the testimony taken before me was directed to the question as to who composed the firm of Davis, Sprague & Co., or the million tie firm, and also as to who was interested in or composed the firm doing the work west of Elk Mountain. I think that a Mr. Sprague

claimed that he was interested with Davis and Gessner in the million-tie contract, but we had all their books, papers, checks, and receipts, and a great deal of testimony was taken, at the instance of Sprague, to show who were the parties interested in the million-tie contract, and entitled to participate in the profits.

I think considerable testimony was taken as to whether or not William F. Durant was interested in the work west of Elk Mountain, as partner or otherwise.

I found that only Davis and Gessner were interested west of Elk Mountain, and evidence was offered, and I found that only they were indebted on Rogers' claims.

DANIEL W. GILLETT, recalled on behalf of the complainant, at New York, November 24, 1876, testified as follows:

I am familiar with the practice of the State of New York.

The order of November 11th was entered before I was connected with the case.

I should not think that the claimants referred to in that order would have the right of appeal from any decision which might be made under it.

I don't know that they were to have any greater rights than under the ordinary common law practice.

The first issue tried was the Burnham claim. Next, the relationship between the parties themselves, and their liability between themselves. The next question was under the order of November 11th. The fourth was the amount in which the trustees were indebted.

60 Some of the claimants and some of the parties were sworn as witnesses on the main issue.

Cross-examination:

Our practice, so far as equity is concerned, is governed by the general rules derived from the English practice.

The New York suit was in the nature of an equitable proceeding.

B. F. BUNKER, called on behalf of complainant, at New York, November 24th, 1876, testified as follows:

I was in the employ of a concern doing business in Wyoming in 1868, and from thence till the Union Pacific Road was finished.

Q. "What was the name by which this association of persons was known?

A. "Which one do you mean?

Q. "That were engaged in furnishing ties; name or names?

WITNESS. "The first concern, at Fort Saunders, was always known as Davis, Sprague & Co., and the other work, that was done west, was under the name of James W. Davis and Associates."

I was concerned in the New York suit as a creditor, and I acted in the capacity of clerk for Mr. Redfield, and also for the receiver.

Some portions of the books were used in evidence. I can't say where they all are now, because the lawyers on each side got some of the papers and things. Some of the books are in the hands of the receiver, and are situated in those two trunks here present, of which I have the key.

Mr. WHITNEY. Please produce the books before the examiner.

WITNESS. I can't do it, Mr. Whitney. I have been waiting to see Mr.

Nathan, the receiver's attorney. I have been twice to see him, without being able to catch him. I am waiting for his authority before doing it. I understand that these books are still in the custody of the receiver. He has not been discharged. I was up there twice yesterday and once to-day to find the receiver, but failed.

I was with Davis, Sprague & Co. at Fort Saunders up to July, 1868. I think it was the 4th of July that I went out on the western work, by Davis' orders, to see if I could make some contracts out there, and then I left the Davis & Sprague concern, and went as far as Salt Lake,
61 and was there till the road was built that far, when I went back to Fort Saunders, and afterwards to Omaha.

I have seen the receipts which were given by the tie contractors to the Union Pacific Railroad for money, when the firm was known as Davis, Sprague & Co.

I don't recollect ever giving receipts in any other name than Davis, Sprague & Co.

Mr. Reed was disbursing agent and engineer. Mr. Kennedy was cashier.

The company did not require receipts to be given from the start in the name of James W. Davis & Associates.

I was a creditor, and had a lawyer once, though most of the time I represented myself. They had an appeal in my case, at one time; I didn't understand about that, and had to get a lawyer.

Cross-examination:

The concern at Fort Saunders, Davis, Sprague & Co., had a contract for a million ties.

Their operations extended to a point called Elk Mountain, where the million ties were delivered.

From that point west, James W. Davis & Associates furnished the ties; and there were some other parties who furnished ties.

When I went West it was to get contracts for Davis, who gave me directions as to prices I was to pay for ties. Said I was to find out at what points they could be delivered cheapest, and not let anybody know about it but him.

At that time he talked about the parties he wouldn't have with him, more than those he would. I was to have an interest. There was to be a new deal all around, and the old concern was to be wiped out. Gessner was one of the parties he was going to give an interest.

My duties as clerk for the referee consisted of taking minutes, looking after the papers, &c. For the receiver, I had to look after the returns, and done all his work, except paying the money.

I have had charge of the papers, as clerk for the receiver, Mr. F. M. Bixby.

62 HENRY BRODHEAD, being called as a witness on behalf of complainant, at New York, November 26, 1876, testified as follows:

I am an attorney. Know of the New York suit, so called, up to a certain point, and was attorney for Christopher, who claimed to be a creditor of the parties to the amount of ten or eleven thousand dollars.

I made an application to the court to have Christopher made a party.

Here is an affidavit on which I applied for leave, and attached to it is the order to show cause, which served as a notice of the motion.

The court denied the motion.

I don't recollect whether I drafted an order thereon and had it filed.

A claim was allowed in favor of Christopher against Davis, Sprague & Co., and also against James W. Davis & Associates, by the referee in the New York.

The witness' examination being concluded, he states on his own behalf that Christopher came to him as a stranger, and that he had to sue him for his fees afterwards, and does not wish to be identified too closely with his client.

It is admitted that Henry C. Crane will testify that he never signed or had in his possession any other contract than the one heretofore referred to by him in his testimony, and which is set out in the judgment roll of the New York suit.

MARK T. SEYMOUR, being called as a witness on behalf of defendant William F. Durant, at New York, November 26, 1876, testified as follows:

I knew Davis, Sprague, Durant, and others, furnishing ties to the Union Pacific Railroad on the contract for one million.

My first connection with them was with Davis, Sprague & Co., at their headquarters at Fort Saunders.

The parties holding the milllion-tie contract had no other name than Davis, Sprague & Co. at that point.

I afterwards worked for Davis & Associates west of that point.

63 James W. Davis and Associates was the style of the firm. I was superintendent of their tie contracts west of Elk Mountain.

Davis wanted to employ me for James W. Davis & Associates to go West and take charge of their timber and other business.

I objected to doing so if Mr. Sprague had any interest or connection, or anything to say or do about the business whatever. I was assured by Davis that he had none whatever, and was not interested in any way. I mean the Sprague who was interested with Davis, Sprague & Co.

Davis, and those associated with him, carried on the business under the name of James W. Davis & Associates.

I think it was in December, 1868, that this occurred.

Dr. T. C. Durant was present when I had this conversation with Davis in regard to Sprague's interest and work west of Elk Mountain. It was at Laramie, on the railroad track, in front of the office.

While I was connected with the million-tie contractors, I had papers, such as checks, drafts, and vouchers, bearing their firm name and style. It was Davis, Sprague & Co. I haven't got them here, and don't think I have them anywhere.

Cross-examination:

The first work I did was on Dale Creek Bridge. I knew these parties when I was working for the railroad. They were then prosecuting the million-tie contract.

I have seen the books of account of the tie contractors a great many times.

The first that I saw were kept in the name of Davis, Sprague & Co. I saw them the most.

I wouldn't swear positively that I saw the books of James W. Davis & Associates, but I did their papers.

These papers, which had the name of Davis, Sprague & Co., were not time-checks. They were mostly bills for timber.

I had the inspection and measurement of all ties and timber while I was there that was purchased by the company, and used the name of the firm myself.

They were on printed blanks, with the name of Davis, Sprague & Co. printed upon them; and I also wrote the name, Davis, Sprague & Co., upon them a great many times.

64 I have seen that name written by Pierson S. Mattox, their cashier, I think, a great many times.

I think I have seen that name written by Benjamin F. Bunker and by Cornelius Christopher.

I think the name of Davis, Sprague & Co. was used until I left to go West.

I think likely I handled checks drawn on Kountze Brothers. If I did, I think they were in the name of Davis, Sprague & Co., as there was no other concern existing at that time that I knew of.

I have heard a good many persons speak unkindly of Sprague.

Davis and Sprague were both managing men for Davis, Sprague & Co.

CORNELIUS CHRISTOPHER, being sworn for complainant, testified as follows:

My name is Cornelius Christopher.

I have known Rogers since the fall of 1868.

I have known an association of gentlemen engaged in furnishing ties for the construction of the Union Pacific Railway since June, 1868, till now. I was with them from June, 1868, till the time the New York suit was brought.

At first, for a month or two, I was in charge of some ties being driven down the Big Laramie.

Afterwards was taken in the office, and had charge of the books until the close of the firm, aside from two weeks after having gone in as book-keeper, which was about August 1st.

Mr. Mattox gave over the cash to me, and gave me full charge of the cash books and everything, about the 1st of February, 1869. I was made cashier of the concern, and remained so until they closed up.

Davis, who was represented as trustee of the firm, told me it was composed of himself, Sprague, Durant, Richards, Rush, Wilhelmina D. Traint, and Gessner.

I was first employed by M. T. Seymour, who was superintendent of the works in June, 1868, to take charge of some ties in the Big Laramie River.

65 About the 1st of August, 1868. I went into the office about two weeks later. I was made assistant cashier. Had charge of all the cash and cash books, and although Mattox remained in the office as cashier, he did very little.

The business wasn't really closed until after the bringing of the suit in New York, at which time they were still getting out some ties at Pied-

mont and North Platte, and a great many accounts were unadjusted, and were being adjusted, all along the line.

When I was with them, they were furnishing ties all along the line in the Black Hills, Big and Little Laramie Rivers, Cooper's Lake, North Platte and Green River, Piedmont, Tie Siding, and, I think, down to Bear River. That embraces the whole line from Black Hills to Bear River.

They furnished ties as far west as Promontory.

This association was first called Davis, Sprague & Co., but as I was informed by Mattox and Davis, the firm name was James W. Davis and Associates.

I was informed so after having signed a check for the concern in the name of Davis, Sprague & Co., and which was returned from Kountze's bank by Mr. Sherman, their managing man at Cheyenne, stating the bank account was kept in the name of James W. Davis and Associates.

I think that was in September, 1868.

I took the letter to Mattox and asked him how that came, and he said that the firm name was James W. Davis and Associates, and referred me to the contract then in the safe, and which was so signed, James W. Davis and Associates, by Davis as trustee, and H. C. Crane, secretary for trustees.

After that, I always signed checks and receipts in that name.

That was while they were delivering ties east of Elk Mountain.

The books kept by this association consisted of memorandum, time reports, day-books, journals, cash-books, ledger, and some time checks, and there was a receipt book.

About 30 days ago those books were locked up in 20 Nassau street, New York, in the vault that T. C. Durant used to use, or is still using, in the rooms where the Union Pacific Company's office used to be.

I kept these books myself.

Q. State in what name or manner these numerous books of account were kept, so far as the association itself was concerned?

66 (Objected to.)

A. "James W. Davis & Associates. There were some time checks printed by Mattox, I think, that were headed Davis, Sprague & Co., but they were soon done away with, having found it was an error.

Before Mattox delivered the cash to me he received it from the cashier of construction, and after about the middle of September, 1868, I most always drew the cash and disbursed it, and was always compelled to sign the receipts. I signed one to Mr. Kennedy, who was cashier of the road, in the name of Davis, Sprague & Co., and he wouldn't receive it, and I had to make another in the name of James W. Davis & Associates.

During all the time that I was cashier, the receipts for money received from the road were signed James W. Davis & Associates, by Christopher, cashier, and assistant cashier.

We kept the bank account with Kountze Brothers at Cheyenne, H. J. Rogers & Co. at Laramie City, Rogers & Co. at Cheyenne, Wilson & Morton, at Bryan, and also at Echo City, and all kept in the name of James W. Davis & Associates.

While Mattox was cashier, he made deposits and drew checks, part of the time, and I part of the time.

When I was made cashier I did it all, except some checks drawn by Davis.

I don't remember the time at which about a million ties had been delivered to the road.

There was no change made in the membership of this association during the delivery of ties by it, nor was any settlement made with the railway company for ties theretofore delivered, and a new account opened.

I made all the settlements as far back as the middle of August, 1868.

No notice was ever made public of any change in this association that I know.

The association furnished nearly two million ties.

Q. "Did you ever hear Davis say, or did you ever know of his writing that no one but himself and Gessner were interested in furnishing ties west of Elk Mountain?

(Objected to.)

A. "No, sir; but on the contrary, he wrote me the names of the members of the firm. I think that I have the names of the firm yet, in his own handwriting."

67 (Answer objected to by Mr. Lawrence.)

I haven't the letter with me, but it is at home.

Mattox ceased his connection with this association some time in February, 1869.

I was in the employ of this association, and continuously on duty in the month of November, 1868, and no general settlement was made with the creditors during that month, only regular pay day, which was about the 15th.

The time checks with Davis, Sprague & Co.'s name on were printed by order of Mattox, when he first came to the firm.

I don't recollect any documents or books of account used by this association with the name of Davis, Sprague & Co. upon them, except those time checks, and the receipts which I mentioned above.

I knew of Rogers discounting or otherwise becoming the owner of quite a large amount of James W. Davis & Associates' paper, which was not paid.

The witness states:

I can't give you a description of it from memory.

The witness is here shown printed copy of the complaint in the suit of Rogers against Durant and others in the supreme court of New York, for the county of Kings, and asked to identify the commercial paper therein described as being that which Rogers discounted, and which was not paid.

The witness states:

I can't recollect all these accounts; some of them I can, although the names are not given.

On reading from page 3, I can identify them all, since the names are given.

Q. State if Mattox ever told you, during your connection with this association, that there was a change in the members or the name?

(Objected to.)

A. He never did.

I know of the suit in the supreme court of the city, county, and State of New York, brought by Durant, Sprague, and others, in September,

1870, and this document which you now show me is a part of the record.

I was served with a notice like this which you show me in that
68 record in the order of November 11, 1870, notifying persons having claims, to present their claims, and under and by virtue of that notice, did present my claims.

My attorney's name was Henry Brodhead.

Q. "State what proof you were allowed to make."

(Objected to.)

A. "We were allowed to make only such proofs as appertained to our claims direct; that is, proving the validity thereof.

Q. "State if you did or did not attempt to present proof as to the main issue raised by the pleadings in the case, namely, as to the personnel of the tie contractors."

A. "Yes, sir; I did attempt to prove who were the partners before the referee in that case, but he objected to such evidence coming in, stating that we were simply proving our claims, and that was all we could do against the firm, or firms, as he claimed it."

The document you show me, marked "H. J. Rogers, Exhibit A," was to make me a party to the suit, being one of the creditors. It is a copy of the original.

Q "State what action your attorney took, as you remember it, upon that proceeding to make you a party."

(Objected to.)

The WITNESS. "He made application and an argument upon it, I think, but the motion was denied."

Davis, Sprague & Gessner managed the business of the concern.

Mattox at that time never made any pretensions to being a partner.

Q. "State whether Rogers ever inquired of you, while in the employ of the association, what individuals were members of the firm, and under what circumstances, and at what time he made this inquiry of you, if you remember."

(Objected to as incompetent.)

The WITNESS. "Along in May, 1869, when we had some trouble at Piedmont with the contractors of the road, Rogers was solicited by a great many parties to cash the paper that the firm had given to subcontractors, and Rogers came to me and asked me who composed the firm of Davis & Associates, and I told him as it was given to me by Davis and Mattox, that it was Davis, Sprague, Durant, Richards, Ruth, Gessner & Mrs. Train."

69 Q. "Did Mr. Rogers state to you, when he made this inquiry, the reason why he wanted to know who the personnel of the firm was; and, if so, what?"

(Objected to.)

A. "Never more than in a business way. He said he always wanted to know who composed a firm with whom he was dealing."

Cross-examination:

On looking at the document marked H. J. Rogers, Exhibit B, I recognize all the names, and, from memory, the opposite amounts, having copied them a great many times.

I think Rogers became the owner of all these by purchase.

Some of them were issued by one of his banks.

I don't know that he held any of them as collateral security for debts due him from other parties.

I don't think I so testified in the New York suit; nor do I recollect that Rogers admitted in that suit that he held some of those pieces of paper as collateral security.

I was familiar with Rogers' claims in that suit, so far as the issue and amounts were concerned, and aided him so far as I knew of the validity of the claims against the firm of Davis and Associates.

We talked over the matter several times; I don't recollect how many or where.

Q. "Well, were you not in conversation in that matter very frequently?

A. "We might have been."

Q. "Of course you might have been, but I ask whether you were or not?

A. "Possibly we were."

We saw that things looked very critical there; heard they were endeavoring to swindle the creditors, and we were trying to see if we could not get some of our rights.

I took no interest whatever in Rogers' claims.

I am not interested in the event of this suit.

I testified in the New York suit in regard to the partnership question, as it was called, or as to the individuals who composed the association of James W. Davis & Associates on the main issue, in part, but when I went to tell who were connected with it they stopped me on both sides.

70

I have forgotten whether or not I signed and swore to an affidavit in the course of that suit, before the referee, as to the issue who composed James W. Davis & Associates.

I testified before Mr. Redfield, the referee, but what it was I could not remember, without seeing the affidavit.

The reason all this commercial paper was not paid was because we could not get the money from the railroad company.

I mean to say that neither Rogers & Co. nor H. J. Rogers & Co. had the money in their possession to pay the checks drawn upon them.

I don't remember whether James W. Davis & Associates had a credit balance with the concern of which Rogers was a partner on June 1st, 1869.

We had an uncollected draft on New York, I think, in Rogers' hands —two drafts at sixty and thirty days—from the 7th or 8th of May, 1869.

I think these drafts were for $61,500 each.

They were not for $53,000 each, but for $61,500, I think; I think that is the amount.

They were deposited with Rogers upon a special understanding, which was, that, when collected, they were to be paid out upon checks of Davis & Associates.

The paper mentioned in Rogers' Exhibit B was not drawn against that fund, because, at that time, there was more of their paper out than would consume these two drafts, and I was dividing up the money as carefully as I could between all the creditors proportionately.

Davis and I checked out the amount of those two drafts about the time they fell due.

I think some checks were given in advance, and Mr. Rogers cashed them.

I don't think that there was a sight draft upon Omaha for either thirty thousand or fifty thousand dollars, deposited about the same date, although about that time there was a draft deposited in the bank of Wilson & Morton, at Echo City, for thirty thousand dollars.

(Complainant's counsel objects to cross-examination upon the subject of complainant's ownership of the commercial paper, or his good faith in its acquisition, and moves to strike out all that has been said on that subject.)

71 The two large drafts were paid.

I kept a check book which showed our balance with Rogers & Co. I carried the balances along on the stubs of the check book, then entered them at once in the cash.

The account which I kept was correct. I never manipulated anything.

It is not a fact that, for nearly all the time from May 8th, 1869, till in August or September, 1869, James W. Davis and Associates had a credit balance with either Rogers & Co. or H. J. Rogers & Co. I think we were all the time overdrawn, not taking into account those drafts not yet matured.

The million-tie contract I referred to, I think it was mentioned that it was to extend to the North Platte River.

I cannot say positively that the furnishing of ties under that contract was completed or not, at or near Elk Mountain.

I don't think I stated in those words, or made affidavit that the million-tie contract was completed at Elk Mountain. I might have stated that more than a million ties were furnished east of Elk Mountain, which is true.

The letter from Davis, which I referred to, was given me from Davis' hands.

I think all the papers pertaining to the subject-matter, in litigation in the New York suit, were left with the receiver there.

I don't know of any person taking away the check, or bank books I referred to, unless it was Davis.

I first knew Rogers after I went to work for James W. Davis & Associates.

I first went to work for them, I think, on the 1st day of June, 1868. It was not July.

I don't know what pay I was getting. I have forgotten.

Mattox then had charge of the financial department.

I went into the office about August 1st, 1868. We were both there from that time to February, 1869.

He stayed there as a figurehead, but did not handle the cash two weeks after I came there.

I don't think he made an entry in a book after I went there, except, perhaps, drawing a check once in awhile.

72 They did not then, in August, have an account with Rogers & Co. or H. J. Rogers & Co. I think they commenced in October.

Mattox opened the account with both of those banks.

The office I was in in August, 1868, was at Fort Saunders, where I remained until about January 1st, 1869; then went to Piedmont, just two

or three miles beyond Tie Siding, where I remained till May or June, 1869; then returned to Fort Saunders, where I remained till October; and from there came to Cheyenne, and from Cheyenne to Omaha. Remained in Cheyenne only a week or two, and at Omaha till I went to New York. I think I left on Thanksgiving day, 1869.

I kept my individual bank account with Rogers & Co. in my own name, but did not have any of the firm monies in that account.

I have forgotten how large a balance I ever had individually, though it was very small.

The largest was something over $2,000 perhaps.

The conversation I had with Rogers, in which he asked me who composed James W. Davis and Associates, was at Piedmont, somewhere between the 5th and 9th of May, 1869. I guess before those drafts were deposited. I have forgotten who was present.

I remember now that it was in the office.

Nothing in particular makes me remember that it was in the office.

Don't know who opened the conversation. Also talked about what the capturing of that outfit would terminate in. Nobody else took part in it except Rogers and I, that I know of.

Ed. Winters was present, and old man Lathrop.

I will be 33 years of age next February.

In this suit in New York of mine against Kountz, several of the witnesses, parties on his behalf, testified that from my general reputation, either as to honesty and integrity or truth and veracity, they would not believe me under oath.

I have good reason to believe that they were bought to testify against me.

Pierson S. Mattox was one man.

Q. "Who else?"

A. "Mr. Kountze's brother-in-law, Mr. Ruth."

Q. "Anybody else?"

"A man by the name of Morton, of Detroit, Michigan; a man
73 by the name of Tilton, whose residence I don't know; also Mr. Allen; so did T. C. Durant."

I have kept in communication with Mr. Rogers.

Presume I have written him two or three times a year. Nothing about these matters, except he wrote and asked me if I would come and testify in the case, as I knew all about it, and I told him I would when I was required.

Redirect examination:

I don't recollect whether I was present every time that Rogers testified himself, or offered evidence about his paper in New York.

I was mainly interested in attending to my claim, and was held there by the firm to help adjust their claims.

UNITED STATES OF AMERICA,
Northern District of Illinois:

Circuit court thereof.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, WILLIAM F. DURANT, ET AL. } Chancery.

And thereupon, on the 5th day of December, A. D. 1876, counsel for said complainant and said defendant, Durant, both being present, counsel for defendant Durant, at my office, in said city of Chicago, stated that he offered in evidence certain portions of the testimony of Henry J. Rogers, given in the trials of a suit pending in the circuit court of the county of Cook and State of Illinois, wherein said Rogers, complainant in above-entitled suit, was plaintiff and the defendants in this suit were defendants, which suit was known as the "Collins suit," being brought to recover the amount alleged to have been paid by said Rogers on an appeal bond given at the request of Davis, Sprague & Co., and also offered in evidence the record of certain proceedings by one R. S. Grant to be made a party and participate in the fund coming to the receiver in a certain cause in the supreme court of the city, county, and State of New York, and heretofore referred to as the New York suit.

That by agreement of counsel said testimony so offered was not read at said time, but it was agreed that it should be considered as in the record, and such reference made to it thereafter as counsel desired.

JAMES F. MEAGHER,
Special Examiner.

74 *P. S. Mattox.*

Deposition of P. S. Mattox, taken October 30, 1876, in the case of Hurlburt vs. Durant et al., and used in this case under a stipulation.

I know of a copartnership by the name of Davis, Sprague & Co., which had business with the Union Pacific Railroad—a tie contract.

They had a contract with the contractors of the Union Pacific Railroad for furnishing ties, known as the million-tie contract.

Some of the ties got out by Davis, Sprague & Co. went to Elk Mountain, but they were all got out east of that locality; they never got out any ties west of Elk Mountain.

James W. Davis & Associates was the style of the firm who did business west of that point in getting out ties.

I have heard Davis say repeatedly, and he has told me, that no one was interested in that firm but himself and Gessner.

Gessner has stated to me repeatedly that he was a member of that firm, and that no one but himself and Davis were in it.

I was cashier for Davis, Sprague & Co., and had charge of their finances and accounts. There was no other cashier, except those who acted under me. I had one or two assistants.

I know Christopher. He was a book-keeper under me when I was acting for Davis, Sprague & Co., as cashier, and before the completion of

Davis and Associates' contract I resigned and came East, and understood that he acted in the capacity of cashier for Davis and Associates after I left there.

I acted as cashier for Davis and Associates until I left, in the latter part of February, 1869.

James W. Davis and Associates had an account with Kountze Brothers & Co., of Cheyenne. Davis and Associates, I understood, had an account with H. J. Rogers & Co., but not while I was with them.

The firm of Davis, Sprague & Co., sometimes negotiated paper with Rogers & Co., or H. J. Rogers & Co., but did not keep any regular bank account with them. Our account was kept at Kountze Brothers & Co.'s.

I was on the ground looking after the business when the million-tie contract was closed. I made a settlement with the engineer in charge of their accounts on the 1st day of November, 1868.

James A. Evans was the engineer in charge of the construction.

75 I had a final settlement with him on that day of all the affairs of Davis, Sprague & Co.

At the time of the settlement, Davis, Sprague & Co. had a large surplus of earnings, and all claims against them, as they were presented at that time, were paid.

After the Davis and Associates' business had been concluded, and the road finished, a suit was brought in New York, in which it was tried to make it appear that Davis, Sprague & Co. were liable with Davis and Associates for these debts; and I think that some extra bills were allowed as against Davis, Sprague & Co. for extra work since the date I speak of—the 1st of November, 1868; but Davis, Sprague & Co., at the time of the settlement of this contract, had a large surplus, and were ready to pay all they owed; all accounts that were properly certified were paid before I left there, except these extra bills that were paid at the time I speak of.

I succeeded Mr. B. F. Bunker, as cashier for Davis, Sprague & Co.

After the original contract, known as the million-tie contract, had been concluded, or about concluded, ties were being delivered along the line of the road beyond the point to which that contract extended, and Davis and Associates took charge of the work after that time, assumed all responsibilities, and notified everybody in the country that they alone were responsible.

Davis, Sprague & Co. had nothing to do with it; that was generally understood; that all the ties west of Elk Mountain was to be under the name of Davis and Associates, and no one was connected with that firm except Davis and Gessner.

Neither Davis nor Gessner ever stated that William F. Durant was a partner in James W. Davis and Associates.

They stated distinctly that he was not; both of them so stated.

About that time there was a gentleman named Ruth, who lived in Cheyenne, who claimed to me several times that he was a partner in Davis and Associates, and wanted to have access to the books, and all privileges that a partner would demand; Mr. Davis at the time was absent in Omaha, and I wrote to him, asking him what interest Mr. Ruth had in the firm of Davis and Associates, and Mr. Davis wrote back to me that no one was interested but he and Gessner; that Ruth was interested in the firm of Davis, Sprague & Co., and not in the firm of Davis and Associates.

That letter is in the hands of the attorneys in the New York suit,
76 which was a bill filed by some of the partners to settle up the co-partnership matters, and all parties having claims against either of the firms were notified to present their claims at that time.

Cross-examination:

I commenced with Davis, Sprague & Co. in the spring of 1868, and was employed by Davis.

The time checks used at that time were made out in the name of Davis, Sprague & Co., most them; some in the name of Davis and Associates. I gave receipts for money to the paymaster of the Union Pacific Railway as a part of my business. I don't remember now just how those receipts were signed.

I have never seen an original contract for one million ties between the trustees and James W. Davis and Associates, signed by the firm. I think the original contract was signed by Davis and Sprague individually, although I am not positive. It was not signed James W. Davis and Associates; I am certain of that. I have had the original contract in my possession.

I employed Christopher to aid me early in the fall of 1868. I don't remember the month. I think he stayed after I left. He was one of the three book-keepers. He never had any authority to sign contracts or give checks except by special commission. I don't know what his business was after I left.

The business of the contractors was not carried on from the beginning of the million-tie contract in the name of Davis and Associates.

I think the accounts of Davis and Associates were kept on the same books with Davis, Sprague & Co., but distinct, by order of Mr. Davis.

The books were opened as books of the firm of Davis, Sprague & Co. After Davis and Associates assumed the business, the orders from Mr. Davis were that the accounts were to be kept separate. No instructions were ever given to get a new set of books, but they were ordered to be kept separately on those books.

I never told Christopher, that I remember of, that the name of the firm from the start—that which had the original contract—was James W. Davis and Associates. I did not refer him to the original contract as evidence of the fact that that was the right name, nor to ascertain what it was, that I have any recollection of.

The books were not kept in the same name, from first to last.

They were kept in the name of Davis, Sprague & Co. up to the completion of the million-tie contract, November 1, 1868, at which time
77 the firm name was changed to James W. Davis and Associates. I suppose I saw the books every day.

It was understood, previous to the 1st of November, 1868, that after the completion of this contract, the firm name was to be changed; but no notice was given to keep the accounts separate until after that time.

I don't think that the bank account with Kountze Brothers & Co., and H. J. Rogers & Co., was kept in the name of James W. Davis and Associates from the beginning.

I was a witness in the New York suit.

James W. Davis never told me that W. F. Durant had frequently admitted to him that he was a partner of James W. Davis and Associates.

Davis, Sprague, and I had charge of the business out West; after I left, Sprague and Davis. Durant was out there occasionally, but not often.

Davis notified me verbally, and also by letter, that the firm was changed, and instructed me to keep the accounts separate.

Notice was given to the community through me, acting under Davis, as general manager, and by Davis himself. I don't remember of telling Rogers that there had been a change, but I did tell Christopher, I think, while at Fort Saunders, and after I had received notice from Davis, that there was a change. It was necessary to notify Christopher to keep his books accordingly.

We never had a regular bank account with Rogers & Co.; we had some deposits there, and made some acceptances; our business was done with Kountze Brothers & Co.; in fact, I was notified at one time by Davis to have nothing to do with Rogers in any way, shape, or manner.

Now that you show me a copy of the contract, I may have been mistaken; but my impression was that it was signed by Davis and Sprague.

I presume the books of account of the tie contractors are in the hands of the receiver, in New York.

Davis drew out the balance due Davis, Sprague & Co., on the completion of the million-tie contract and invested it in Davis and Associates, and swamped.

The trustees of the road did not pay a distinctive balance to Davis, Sprague & Co.; it was drawn through me; all the money was drawn by me, and was paid out on drafts of Davis and Associates. I don't suppose the trustees knew where the money was going; they paid it to me—all that was due.

78 I had one-tenth interest in the million-tie contract.

As I understood, the contract of Davis, Sprague & Co. expired, and the partnership by limitation; and frequent demands were made by all of the partners except Davis afterwards, for the settlement of the business, but we never could get it.

He drew the money out, but we never could get a settlement with him until this matter came up in New York.

When the contract was completed the firm was at an end, as I understand it.

Davis, Sprague & Co. sold what surplus ties they had on hand at the completion of the contract to Davis and Associates; this was after November 1st, and until the surplus ties were absorbed. Davis made the sale.

I always considered that there was two contracts, the million-tie contract, which was made with Davis, Sprague & Co., and the contract west of Elk Mountain, for an unnumbered amount of ties; enough to finish the road; I never was under the impression that it was all one contract.

Redirect examination:

Part of the books of James W. Davis and Associates were kept at North Platte and Tie Siding; the books of Davis, Sprague & Co., were kept at Fort Saunders.

Davis drew out the surplus fund of Davis, Sprague & Co., and used it in the work west of Elk Mountain; and that was the way in which some of those accounts might have got on the books afterwards.

Davis talked publicly, and made it generally known that he was going

to have a new deal after the million-tie contract was completed, and he told me that repeatedly, and also talked of it generally.

I knew Kennedy, who was cashier of the contractors for building the Union Pacific Railroad.

On his books the accounts were kept, as James W. Davis and Associates west of Elk Mountain, and east as Davis, Sprague & Co.

All the ties were delivered on the railroad subject to inspection. The tie inspectors were appointed by Davis, Sprague & Co. We sent men into the woods, and each gang had a superintendent; and if the ties were according to the standard, he gave an order on me, as cashier, for the pay; afterwards they had to be inspected by the railroad company's inspector. We received regular orders from our inspectors, of the amount of ties furnished by subcontractors.

79 Mr. Sprague was the only partner there, and made frequent objections to the sale of surplus ties to Davis and Associates.

WILLIAM F. DURANT, the defendant, upon an examination on his own behalf, on the 26th day of February, A. D. 1877, at Chicago, testified as follows:

I am about 55 years of age. Live in Chicago. I have lived here 10 or 11 years. I have known the defendants in this suit 8 or 9 years, and Mr. Crane longer.

I was engaged in getting out ties on the Union Pacific road, with the other defendants.

The business was carried on in the name of Davis, Sprague & Co.

I was connected with the contract known as the million-tie contract.

I never was interested with my codefendants, or any of them, or any persons whatever, in carrying on any business, or furnishing any ties to the Union Pacific Railroad Company, under the name and style of James W. Davis & Associates.

I understood there were parties engaged in furnishing ties for that road in '68, '9, and '70, under the name and style of James W. Davis & Associates. I got my information as to this after the million-tie contract of Davis, Sprague & Co. was closed.

I understood that Davis & Gessner were getting out ties by the name of James W. Davis & Associates.

I was informed that Davis & Gessner constituted this firm, or association, by parties in New York. Also by Davis himself, that he was going to take the contract. I had a conversation with Davis about it late in the summer of 1868, the latter part, here in Chicago.

Davis was on his way to New York, and stopped at the Tremont House. He said he was satisfied there was going to be a good many more ties needed to build that road than what was contracted for, and he was going to try to get a contract from the trustees to supply what they wanted, and if he did so, it would be an entire new deal, unless I wanted to take a share in it; he might let Gessner have an interest, but he should have it all his own way.

I stated to Mr. Davis simply, that I wanted nothing to do outside of the million-tie contract, and I should take no interest.

80 I never acquired an interest outside of the million-tie contract afterwards.

I don't remember whether I talked with Gessner on the subject or not. I did not know much of him at that time.

The million-tie contract, I think, was a written one. It was not delivered to me, nor have I any copy of it.

I don't know whether the copy of it set out in the record of that New York suit is correct or not, except by seeing it in the record.

I was a plaintiff in that suit. I suppose my attorneys got the copy of the contract from Mr. Crane.

The written evidence of my interest in that concern was an assignment of of $\frac{3}{10}$ a contract made between the trustees and Davis and his associates, I think.

That is the assignment which I received, and is in Davis' writing.

I furnished money for Davis, Sprague & Co., to be used in carrying on the business under the million-tie contract.

I have read Rogers' bill of complaint.

I never authorized any of the paper described in that bill to be made, accepted, or executed by any one for me in the name of James W. Davis & Associates.

I never executed any of it myself.

I never assumed or agreed to pay any of it.

Davis & Sprague, I believe, procured the million-tie contract.

It was not settled before the same was obtained as to who should be interested in it.

I have no personal knowledge of any assignments of interest of any other parties.

When the assignment was made to me it was told me that the firm name was Davis, Sprague & Co. The contract was to be known as that concern.

James W. Davis and Sprague told me that in New York.

Mr. Crane also told me that the firm name was Davis, Sprague & Co.

I did not have the management of the business of the concern.

I was out west twice during the progress of the work, I think but twice. Once early in the spring of 1868, and the other time in December, 1868, or the first part of January, 1869.

81 When I was out there in the spring of 1868, everything that I noticed was carried on in the name of Davis, Sprague & Co. Goods that were shipped were marked in that way. Boxes received there were marked Davis, Sprague & Co.

I went out on an excursion with some parties. They went on beyond to look after some grading contracting. I don't know but I was at Fort Saunders two or three weeks before they came back, and I had nothing to do there, and they were receiving a good deal of timber and ties, and I amused myself by telling them where to put it and land it. Kind of opened a lumber yard and arranged it.

I never heard this contract known or spoken of, or heard anything but Davis, Sprague & Co. when I was there. The contract was always known as the million-tie contract. The firm name was Davis, Sprague & Co.

The ties delivered under the million-tie contract were used from the Black Hills westward.

I am not enough acquainted with the geography of the country to know the different points.

Elk Mountain was the terminus of the million-tie contract.

I know this from information and from the records, but have no personal knowledge as to it.

Personally, I had nothing to do with the delivery of ties, beyond what transpired while I was there in the spring of 1868, at Fort Saunders.

I did not know when the million tie contract was completed till afterwards. I have no personal knowledge of it.

In the fall of 1868 I understood it was completed, and was so informed by Davis and by Mr. Mattox; also when I was out there, and I had heard in New York that the million-tie contract was closed in the fall of 1868. Mr. Sprague also told me so.

About January, 1869, I went out there with a party to go through to Ogden, and in my own interest, to find out about how our matter stood, and get a statement if I could of the million tie contract.

No one, to my knowledge, had any authority after the completion of that contract to use my name, or the name of Davis, Sprague & Co., in giving commercial paper, or making acceptances, or drawing checks, except for debts growing out of the contract, and for the purposes of settling up.

I had conversations with T. C. Durant, Sidney Dillon, and Mr.
82 Bushnell, who were three of the trustees, in regard to being interested in the work beyond the million-tie contract.

They told me that Davis had been to them for another contract to furnish ties beyond the million tie contract, and they wouldn't give him one.

They told him he and Gessner could furnish ties beyond the million tie contract, and they would pay as delivered at certain points, and fix a price, as they would pay any other parties.

They told him that they had not any confidence in his management, and that they were building the road very fast, and that if he was going to boss the thing himself, or unless he would have it done by such partners as they wanted, and who were responsible, they would not agree to anything except a parol contract.

They said they understood I was kicked out. I told them I didn't know whether I was kicked out.

I said, decidedly, I would have nothing to do with it if he got it, outside of the million-tie contract.

I have always told Rogers that I never was a party, or interested, except in the million tie contract of Davis, Sprague & Co.

I don't distinctly remember whether I first saw him in the fall of 1868, when I was west, or after that. I don't remember now of ever seeing him until I met him in New York, but may have done so.

I don't remember being introduced to him by Mattox in the spring of 1868. I may have met him. There were a great many coming in and going out but I don't remember having any conversation there.

I am one of the parties to the New York suit.

The "Does" in that suit were used to represent unknown parties.

I think about $64,000 was paid over to the receiver in that suit.

I was there for a short time. The suit lasted a great while.

Some of the parties were presenting and proving their claims, and I saw Rogers while I was there.

He told me that he was there, with other creditors, to prove up claims,

and stated that he had a large amount of claims against James W. Davis & Associates that he had filed before the referee.

I was in the referee's room once when he was on the stand, and I understood that he was on at different times. I have no personal knowledge of but once.

Mr. Rogers made no demands on me personally at that time.

83 He said he had a claim that he considered an honorable claim, or a debt of honor, on an appeal bond.

At first I understood him that the appeal bond was against James W. Davis & Associates. I don't remember distinctly whether he remarked it was against the million-tie contract, or Davis, Sprague & Co., but he said that it was an appeal bond, and I think he said the amount was $2,500 or $3,000. He wanted to know if I could help him on that claim. I told him I had nothing to do with it, and advised him to put it in before the referee; that if he had an account on an appeal bond, that I considered myself liable, and he should receive the value that went against him, but he did not ask me for any payment. He merely wanted me to use my influence, and help him get this money. I told him I would help him the same as any other party.

Rogers did not show me any commercial paper, or make any demand against me upon any of it. He asked for assistance merely on an appeal bond.

There were several issues in the New York suit.

One was to establish a point where the million-tie contract was closed, and another to get a settlement between the two concerns, Davis, Sprague & Co. or the million-tie contract, and James W. Davis & Associates, and to give a chance for the creditors to come in and prove up their claims, and settle the thing up—close it up.

It was understood that the creditors of Davis & Sprague would get much larger dividends than those of J. W. Davis & Associates, and I was told by my attorneys that there was a strong effort on the part of the creditors of James W. Davis & Associates to establish the identity of that firm and Davis, Sprague & Co.

I never received any notice of protest of any of the paper, acceptances, checks, or drafts mentioned in the complainants' bill.

My residence was in Chicago at that time.

I have no personal knowledge of the relations of Rogers, as banker, to the firm of James W. Davis & Associates.

I had nothing whatever to do with them.

I don't remember having any conversation with Rogers in the spring of 1868, or anybody outside the parties about any trouble between Davis & Sprague.

I think I should remember it if I had made such complaints to him.

I never talked business with a stranger.

84 Rogers has brought suit against me here in Chicago on the appeal bond which he talked to me about in New York, and that suit is still pending.

There was a judgment obtained against Mattox and me on the first trial, which was afterwards reversed in the supreme court. and is now there again on a second appeal by me.

After the first judgment was obtained against me in that suit, I had a talk with Rogers in regard to the liabilities of Davis, Sprague & Co.

While that suit was going on, Rogers sent a note to my house to come down to some bank and meet him at a certain hour; that he wanted to see me. I went there and he had gone out. I started to come down to this office and met Mr. Rogers on the walk, and he walked back with me and said he wanted to sit down and talk with me. We came up to this office, and he said he wanted to know if I wanted to go in and make a little money. I told him I was open for anything that I could turn a penny at, or some such remark, and he then told me that he knew of one claim of Davis, Sprague & Co., in the shape of a judgment, that he could control, and wanted to know what I would give for it, so that he could make a little money out of it.

He said that it was a judgment that a man by the name of Hurlburt held, formerly Laycock, of about $6,000, and that he could buy it if I went in.

I told him that I had not any money to put into it; that it was the first thing that I knew about it, and he said that it was the only thing that was out against them—the only thing out against Davis, Sprague & Co., in the way of a claim that he knew of.

I afterwards received a letter from him on the subject. This is it, dated Appleton, March 16, 1874:

["Ames Wood Pulp Co., Appleton, Wis.]

"APPLETON, *March 16th*, 1874.

"W. F. DURANT Esq., *Chicago:*

"DEAR SIR: I was in Chicago the other day, but did not have time to see you. I write to sound you on the money question. Are you prepared to make me an offer for that old judgment? As I told you when I saw you last, I am importuned by parties who have a claim or judgment against Davis, Sprague & Co. to know what my suit amounted to. I have given them no satisfaction. I suppose they are waiting to sail in if they can find out anything about you. My judgment amounts to $2,927.44. What will you give for it?

"Yours, truly,

H. J. ROGERS."

85 I have not made a dollar out of my interest in this million-tie contract.

I never told anybody that I was a partner in James W. Davis and Associates.

All my co-defendants were interested in the million-tie contract.

Cross-examination:

I was a member of the association having the million-tie contract.

I was a witness on each trial of the suit brought by Rogers against me on the bond in the State court in Cook County, Illinois.

I don't remember all the testimony in those two trials, nor whether I said anything about Davis & Associates.

The first time I was in Wyoming, I remained two or three weeks, at Fort Saunders all of the time.

Cheyenne is east of Fort Saunders; I don't know just how far.

I only know where the million-tie contract ended from hearsay and

from the records proven up in court in New York. The point was Elk Mountain.

I don't recollect how long I stayed the second time I was out there. I went clear through to Ogden.

The road was not finished then. We were two days and a night going out with four horses.

The time I opened the lumber yard was early in the spring of 1868. The lumber yard was there, but I assisted in getting it into shape.

The lumber was brought from the mills.

I saw freight received marked Davis, Sprague & Co., at Fort Saunders, when I was there in the spring of 1868. I think it was in April or May, 1868.

The freight consisted of pork, ham, axes, clothing, boots and shoes, &c. I don't know where they bought goods, except at Cheyenne and Omaha.

I suppose freight was received from both points, as Davis, Sprague & Co. furnished their subcontractors with outfits.

I don't know in what name the vouchers to the railroad company were signed.

I never saw any of the receipts.

They had vouchers there of Davis, Sprague & Co., all that kind of thing, but I never paid any attention to it. Was not in the office
86 on pleasant days. Bill heads and receipt-books were in the name of Davis, Sprague & Co.

Davis was the manager of the million-tie contract.

I know he managed the million-tie contract, because it was understood between the contractors that he should be the manager of that contract, and that Sprague should be the superintendent.

I heard he and Gessner were furnishing ties beyond the million-tie contract.

I did not know when the million-tie contract was closed. I was engaged in another matter in Iowa part of the time.

As soon as I heard of it I wrote Mr. Davis and Mr. Mattox several letters, for them to give me a statement of the million-tie contract.

This was in the fall of 1868, after I had been informed that it had been completed.

I was not paying claims while the New York suit was going on. I don't know that anybody was.

That suit was brought to give the creditors a chance to come in and prove up their claims, and settle upon what concern was owing them. I was not there a great while. The trial was long and tedious—a year or over.

I have no personal knowledge as to whether or not the accounts for furnishing ties from the Black Hills to Ogden were kept upon the same books. I understood they were; but they said there was a change made in the keeping of them.

I never took any part in the details of the management, and never was consulted in that regard. Davis and Sprague managed it by the concurrence of all the parties interested.

I think the trustees told me first that the million-tie contract was closed.

I may have seen Rogers in the spring of 1868. I was in the officers'

car, and at every point we stopped there was every one running in. It was a perfect thoroughfare through the cars. It is possible I was introduced to him.

The conversation in Chicago in regard to buying the Hurlburt claim, was in this building in which my deposition is being taken.

Redirect examination:

The claim upon which Mr. Rogers brought suit in the circuit court of Cook County, which has been referred to, grew out of a judgment which was rendered upon its face against Davis, Sprague & Co.

87 The question of who composed James W. Davis and Associates, was not material.

Recross-examination:

In the latter part of the summer of 1868, I understood the million-tie contract would be completed in the fall, and that there were other parties getting out ties.

Davis, Sprague & Mattox, were not together when they informed me.

I did not know the exact time it was closed, until some weeks afterwards.

The thing has not been entirely settled up to this date, except by the New York suit.

I was in Wyoming in December, 1868, or January, 1869—the first part of January, I think—or the last of December.

Deposition of Thomas C. Durant, a witness on behalf of defendant, taken at New York City, March 7th, 1877.

I am fifty-six years of age; at present operating a railroad as receiver, and my residence is in Warren County, New York. I know the parties to this suit, the plaintiffs, since 1868; the defendants, longer. I was vice-president of the Union Pacific Railroad in 1867, 1868, and 1869, and had general management of the road. I was also one of the trustees of the contractors for building the road.

I know all about the million-tie contract; arranged the details of it, and dictated the terms of it, in connection with Mr. Dillon.

There was no point on the road named in the contract to which it was extended. It was for a number of ties to be delivered at certain points, according to the contract, and they were delivered as agreed.

The million-tie contractors conducted the business of the contract under the name of Davis, Sprague & Co. Davis had no experience in getting out ties, and after the contract was made, I insisted that Sprague, who had an interest in the contract, and who had experience, and was well known, should appear as a member of the concern. Hence the name, Davis Sprague & Co., was proposed and adopted. I did not suppose this was a legal partnership, but an interest of persons in a special venture in a contract. No articles of partnership were ever made to my knowl-

88 edge. When the contract was made, it was understood between Davis and myself, that Davis was to have a one-tenth interest, and more if he could raise money enough to carry it; Sprague one-tenth, and other parties who had capital, or could assist in carrying out the contract,

or whose pecuniary responsibility would be satisfactory to me, should have interests; and I suggested that each tenth owner should put up ten thousand dollars, which would be satisfactory, so that the trustees would be sure of making a contract which would be carried out. The main object of the trustees was to be sure that ties would be rapidly furnished.

With the exception of Sprague and Ruth, the other parties, who were to have interests in the contract were not known until some time after the acceptance of the proposition made by Davis for the contract. These assignments were made by Davis with my consent, and dated back to the time of the contract, and made to Mattox, Ruth, Gessner, Sprague, W. F. Durant, Richards, and Crane, as trustee, thus became interested in that contract.

I know of an arrangement for furnishing ties outside of and beyond the million-tie contract, in which J. W. Davis was interested. There was no written contract nor any arrangement for any fixed number of ties.

The name of this concern was James W. Davis & Associates. A large number of ties were furnished to the trustees. I don't know how many.

James W. Davis' associate in the matter was James H. Gessner, as I was informed. When the million-tie contract was nearly completed, Davis came to me and wanted a new contract. I told him I would not make one without Sprague and other responsible parties would go in with him; that the trustees must build the road, and could not risk contracts for ties unless they were certain they would be filled.

I saw Sprague, and he refused to have anything to do with it, as did W. F. Durant, and Davis said he would not have Sprague or Ruth in the new contract. I finally said to Davis that we could not contract with him, because he could not get strength enough, either by associating capital or responsible, experienced men with him, but that as he was on the ground, I would give him all the preference I could, and would take ties from him, if delivered in time for the purposes of the road, but I would not agree for any specific number, and should reserve the right to fix the price, from time to time, as delivered; and also to buy of other parties as the interests of the road should require.

Davis said he would go to work, and he did go to work, under this arrangement and got out ties. As I understood it, Gessner was associated with him.

89 Davis repeatedly told me that Sprague had no interest in the new arrangement, and told me that W. F. Durant might have, if he wanted it, but I had seen W. F. Durant, and he always refused to have anything to do with it, and I so told Davis.

Mr. Gessner was Mr. Davis' only associate in this enterprise, as I understood it. William F. Durant had nothing whatever to do with any work, contract, or arrangement for any ties furnished said road or trustees other than under the million-tie contract.

I know about the New York case. It was referred to A. A. Redfield. I was a witness, and was before the referee several times during the trial. I suppose that others are more competent than I to state what issues were presented to the referee in regard to the order of trial of the issues and the proceeding, &c.

I know, generally, that the question was tried before said referee in

that case as to who composed Davis, Sprague & Co., and who Davis and Associates, and whether they were the same or distinct concerns. Also, what claims of creditors should be allowed, and against which concern, and whether there was more than one contract, and what amount the trustees of the road owed either concern.

The trial lasted for several months, and was held open, and testimony received on any of the points involved all through the trial, and without any regular order as to the introduction of testimony.

The plaintiff, Rogers, was there, and presented claims against both concerns, James W. Davis & Associates and Davis, Sprague & Co. I don't remember the order he presented them in. The claims against Davis, Sprague & Co., were in reference to two judgments in which Rogers went on appeal bonds.

During the trial Rogers came to me and wanted me to assist him in getting these two claims allowed against Davis, Sprague & Co.

I recollect the transaction in regard to the two drafts, amounting to a hundred and six thousand dollars or thereabouts, which were delivered to Rogers at the time, though I don't remember the exact amount.

At the time referred to, a large number of Davis & Associates' men, workmen, subcontractors, and creditors, were at Tie Siding, a station on the road west of Elk Mountain, where it appeared they hadn't got their pay.

The train on which one or two of the directors and myself were was stopped by these people. I went on the platform to enquire the cause, and was informed that the men were through with their work, and
90 that they and other creditors of Davis & Associates had not got their pay. I requested Davis and his clerks to furnish a list of his indebtedness in reference to this tie business, and also called for a statement of the ties delivered by Davis and Associates to the trustees (the road being then completed), in order to see if the trustees were owing sufficient to pay the debts of Davis & Associates.

The plaintiff, Rogers, was there at the time, and as we should be obliged to wait for the currency, we arranged with Rogers that he, Rogers, should take our drafts on Boston. I think they paid the amount above named, and checked on us for the currency. We got fifty thousand dollars or more in currency, in addition to the drafts, from another source.

The accounts of indebtedness were furnished, and the drafts were delivered to Rogers, and paid afterwards by the company. The drafts and the currency were sufficient to pay the entire amount then reported to be owing by Davis & Associates, as I recollect it.

I have known Christopher since 1868.

I produce copies of three drafts drawn by Davis, Sprague & Co., on H. C. Crane. The originals are before me. They were paid by Crane, who is secretary and assistant treasurer of the trustees. (Said drafts are attached as Exhibits A, B, & C, and are as follows:)

EXHIBIT A.

$6,000.] OMAHA, *March 25th*, 1868.

At one day's sight, please pay to the order of Messrs. Davis, Sprague & Co., six thousand dollars, and charge to account of

Yours, &c.,

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

To H. C. CRANE, Esq.,
20 *Nassau st., New York.*

(Endorsed:) DAVIS, SPRAGUE & Co., by JAMES W. DAVIS.

Pay to the order of Nat. Park Bank of N. York, for collection for account of The First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

EXHIBIT B.

$6,000.] OMAHA, *June* 19, 1868.

At sight, pay to the order of First National Bank six thousand ($\$_{100}$) dollars, value received, and charge to account of

DAVIS, SPRAGUE & CO.,
By J. W. DAVIS.

To H. C. CRANE, Esq.,
20 *Nassau st., N. York.*

91 (Endorsed:) Pay to the order of the Central Nat. B'k, N. Y. For collection for account of the First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

EXHIBIT C.

DAKOTA TERRITORY,
Ft. Saunders, May 14*th*, 1868.

H. C. CRANE, Esq.,
20 *Nassau st., N. Y.:*

Please pay to the order of B. F. Bunker, cashier, five thousand dollars, and charge same to account of

Yours, &c.,

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

$5,000.]

(Endorsed:) Paid at the Central Nat'l Bank.

Pay to the order of Kountze Bros. & Co.

BENJ. F. BUNKER, *Cash.*

Pay to the order of H. W. Yates, cash.

KOUNTZE BROS. & CO.
SHERMAN.

Pay to the order of Central Nat. B'k, N. Y. For collection for account of the First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

Cross-examination:

I have lived in New York City and vicinity for the past twenty-five years. No other place, except, at present, in Warren County. I am a brother of W. F. Durant.

The million-tie contract did not mention any point to which it was to extend. The board of directors had nothing to do with the million-tie contract, and I suppose no notice was given them when the million ties were delivered. I don't know that Davis or any of his associates gave formal notice to the trustees. The engineer and tie inspector of the trustees reported each month how many ties were delivered. This was the method.

The name of the concern who got out the million ties was agreed upon by Mr. Davis, Mr. Sprague, and myself as Davis, Sprague & Co. Their various transactions show it, and their dealings. I was expressly notified that this was the name adopted by them.

92 The Exhibits A, B, and C, which I produced on direct examination, are all signed by James W. Davis, in his own handwriting, and were all paid by Mr. Crane, by my instructions. The signatures on the back are genuine, I think, and were recognized as such by the different banks through which they passed.

These and other like transactions and other things, such as printed receipts, vouchers to Davis, Sprague & Co., receipts signed by them, shipments to them in reference to their said work, are, among other things, how I know the name of the concern.

The name of James W. Davis & Associates was known by similar transactions in that matter, and other means which I have explained.

A little before the million-tie contract was completed, I knew a change was made, because, as I have already stated on direct-examination, Sprague, W. F. Durant, and others, refused to go into the new arrangement with Davis, and I know that the arrangements, above referred to, were made with J. W. Davis; that is, the arrangement for furnishing more than the million ties; and it was expressly understood that these other persons were not in with him.

Old blank receipts, with "Davis, Sprague & Co." printed on them, were changed to "James W. Davis & Associates," and printed vouchers, with "James W. Davis & Associates" on the back, were used in the business of this new arrangement. From the course of their business, the name of the concern, after the million-tie contract was finished, was understood to be James W. Davis & Associates.

Neither W. F. Durant nor H. C. Crane had any interest in the million-tie contract for my benefit, nor did any other person. I had no interest whatever in said contract.

The parties holding assignments of interest in the million-tie contract were to put up money or securities for one hundred thousand dollars, ten thousand dollars for each tenth interest, to secure the performance of the contract. I held securities and money for the benefit of both parties; that is, for the contractors and the trustees. I held for Crane, trustee, and W.

F. Durant, the proportion of the $100,000 they were to deposit according to their interests. In consideration of this, payments for ties to an equal amount were made in advance of the delivery of ties by Davis, Sprague & Co. What other investments were made by the parties referred to I don't know. Davis & Sprague put up nothing with me, as they gave personal services.

As to the arrangement for ties beyond the million-tie contract, Davis came to me, and wanted a new contract for more ties. This was out on the line of the road, and it occurred in several interviews, and once
93 or twice in New York on the same subject; I told him the road must be built as rapidly as possible; that we could not afford to take any chances of delay on account of the inability of contractors to furnish ties; that we were under large forfeitures to track layers if they were delayed. I told him that I hadn't confidence in the men he had about him, and unless he would get Sprague and other responsible and efficient men to help him, he could not make a contract successful. I told him that W. F. Durant and Sprague had both been to me, and said they would not have anything to do with anything beyond the million-tie contract. Davis said he would have nothing to do with Sprague; that he had no objection to W. F. Durant.

I told him, as already stated, that W. F. Durant would have nothing to do with it. Finally, I told Davis, as he had men there, if he wanted to get out ties, the contractors would take them of him as long as he delivered them as fast as wanted, and would pay him a fair price for them, but reserved the right to buy of other parties, and to fix the price.

This is the substance of the interviews. It was all by word of mouth, and I have stated it as fully as I can under this proposition. Davis went on and got out ties, and I afterwards made prices at various points of delivery. This last arrangement was made by the authority of the trustees for building 667 miles of the U. P. R. R., so far as said ties were used on that portion of the road, and as to those used on other parts, by virtue of my being vice-president and general agent of the company.

Davis told me at the time of that arrangement for ties referred to, that he would have nothing to do with Sprague, and that his, Sprague's, name should not be in the firm; Gessner would take an interest, and that the new concern must be James W. Davis and Associates.

I know this, also, from their changing vouchers from "Davis, Sprague & Co.," to "James W. Davis and Associates," the printed vouchers being issued with "Davis, Sprague & Co.," printed on the back; from drafts, checks, and other papers signed in that name in the course of their business. I don't remember of any conversation with Davis in regard to this business in the presence of the others. There may have been persons present, but I don't remember who. I have stated the conversation as fully as I can. At one time, I remember particularly, the ties were not coming in from Davis promptly, and the business was being mismanaged, and I feared that the track layers would be delayed for ties and the contractors put to great loss. I then sent to Davis, and told him unless he would hire Sprague to superintend and hurry up his ties we would take no more ties of him.
94 Several other occasions of the same character occurred. I cannot be more definite as to the times and places. I have telegraphed and written him about the matter.

I produce, as exhibits, copies of telegrams sent about the tie business. (The exhibits are numbered from 1 to 12, and are as follows:)

EXHIBIT 1.

JUNE 6TH, 1868.

J. E. EVANS (care of W. Snyder),
Omaha, Nebraska:

Instruct Kennedy to pay Davis, Sprague & Co. for ties and timber as fast as delivered, until further orders; also advance them twenty-five thousand dollars, at seven per cent. interest, if they want.

H. C. CRANE, *Sec'y.*

EXHIBIT 2.

JUNE 8TH, 1868.

J. E. EVANS (care of W. Snyder),
Omaha, Nebraska:

Carry out instructions of sixth regarding Davis, Sprague & Co., without reference to amount paid on account of material.

H. C. CRANE, *Sec'y.*

EXHIBIT 3.

JUNE 8TH, 1868.

DAVIS, SPRAGUE & CO.,
Laramie City, Dakota:

Keep ahead of track with ties, or we shall order it done for your account, and hold you for damages.

H. C. CRANE, *Sec'y.*

EXHIBIT 4.

JUNE 15TH, '68.

J. E. EVANS,
Laramie City, Dakota:

How many ties ahead of track?

T. C. DURANT, *V. P.*

EXHIBIT 5.

JUNE 16TH, 1868.

J. E. EVANS (care W. Snyder),
Omaha, Nebraska:

Instruct Davis, Sprague & Co. to put on two hundred more teams if necessary.

T. C. DURANT.

95 EXHIBIT 6.

JUNE 6TH, '68.

DAVIS, SPRAGUE & CO.,
Fort Saunders, D. T.:

Evans has instructions to pay you for ties and timber as fast as de-

livered, and in addition advance you twenty-five thousand dollars, at seven per cent. How fast are you delivering ties? Answer. You must have two hundred thousand ahead by July. Put on the men.

T. C. DURANT.

EXHIBIT 7.

JUNE 19, 1868.

J. E. EVANS,
Laramie City:

Notify Davis and Sprague to put men and teams enough on ties to keep you supplied; give them a fair chance, and if they cannot keep up the supply, take charge of it yourself. Show them this, and act promptly.

T. C. DURANT, *V. P.*

EXHIBIT 8.

FEBRUARY 23, 1869.

J. W. DAVIS,
Omaha, Neb.:

Your business wants looking after. Mr. Reed has sent a man to take charge of ties.

T. C. DURANT.

EXHIBIT 9.

MARCH 9, '69.

S. B. REED,
Echo, Utah:

Send a man at once to Piedmont, and pay the men who are hauling ties. Let him pay the vouchers himself, and charge the same to Davis and Associates. Attend to this immediately.

T. C. DURANT.

EXHIBIT 10.

P. S. MATTOX,
Piedmont, Utah:

Reed will send a man to pay on proper vouchers. Are you cashier for Davis and Associates.

T. C. DURANT.

EXHIBIT 11.

FEBRUARY 25, 1869.

J. W. DAVIS,
Omaha, or Piedmont, Utah:

Reed telegraphs we cannot depend upon your organization for ties.

T. C. DURANT, *V. P.*

96 EXHIBIT 12.

FEB'Y 25, 1869.

P. S. MATTOX, *Piedmont, Utah:*

Where is Davis? Why don't he pay his men? He has all the funds he needs.

T. C. DURANT.

S. B. Reed was then engineer and superintendent of construction of the division of road west of Mr. Evans' division.

Davis and Associates operated on Reed's division.

Mr. Evans was on the division where the million-tie contract was performed.

The dispatches signed H. C. Crane were by my order. They may also throw some light on the duty I thought was mine, to hurry up the delivery and attend to it.

The tie contractors were afraid we would put men in charge of their work, which we had the right to do, in case of any delay, and so kept me informed of what they were doing and who the parties were. I was under obligations to the trustees to see that ties were promptly delivered. The company got government bonds on the completion of twenty-mile sections of the road.

Sometimes the graders were ahead of the track-layers, and the trustees were under forfeitures to the track-layers of $5,000.00 a day for every day they were delayed by want of ties; and for these reasons it was important, and my duty, as I had charge of purchasing ties, to know who I was contracting with, and all about the business, and what was being done; consequently Davis and everybody else kept me constantly advised as to said business.

I was not a latent partner of James W. Davis & Associates, and I have fully stated how I acquired the information I have given. I do not think it was consistent with the duty of a trustee to be a latent or secret partner with a tie contractor, as Davis was. I was not such a partner. I obtained my knowledge about W. F. Durant's matters and interests, partly from Davis, and from being a representative of the trustees or company.

I insisted on knowing, and did know what persons I or the contractors contracted with.

I was not a beneficiary in said contract, or in W. F. Durant's real or nominal interest therein. I am not a lawyer, and never was one, and know nothing of the technicalities or mode of practice in New
97 York, except such as my experience as being a party to the litigation would give me. What I have stated in regard to the issues and procedures, &c., in the New York suit, I learned from being a witness and a party and hearing the trial in part. I don't know what was legally or illegally done.

I shall not feel obligated to pay any judgment which may be recovered against W. F. Durant in this suit, or any part of it.

I don't know what the transaction in reference to the hundred and six thousand dollars of drafts has to do with this suit. I did not prompt W. F. Durant to ask about it or anything else.

I know nothing about whether Rogers misappropriated moneys or not, and did not assert that he did.

What I meant in speaking about those drafts was this: that drafts to the amount of about a hundred and six thousand dollars were delivered to him, and he collected them.

Rogers got the money and the debts of James W. Davis & Associates were to be paid with it. It seems, if Rogers held claims against Davis & Associates in June and July, when these drafts were collected, he would have taken the money in his hands to pay such claims. It would be very strange if he did not. This was all I designed to intimate.

I had nothing to complain of to Rogers, and no reason to proceed against him. This money and drafts when we paid them over became the property of James W. Davis & Associates. If it was not properly applied, it was no business of ours.

Deposition of AUGUSTUS KOUNTZE, a witness produced on behalf of the defendant Durant, taken in the city of New York, on the 9th day of March, A. D. 1877, who testified as follows:

I am fifty years of age; a banker, and reside in New York City. I have known Rogers about eight years, and the defendant Durant eight or ten.

In 1867, 1868, and 1869 I was a banker in Omaha. I know that certain parties were interested in a contract commonly called the million-tie contract, but I do not know who all of them were.

The name which said parties used in carrying out said contract I understood to be Davis, Sprague & Co.

James W. Davis & Associates, I understood, were engaged on the
98 western part of the Union Pacific R. R., in its construction west of Elk Mountain.

So far as I know, James W. Davis and James H. Gessner were the only parties engaged in that work. They did business under the name of James W. Davis & Associates.

I know of the New York suit. I filed some claims for Kountze Brothers and for the First National Bank of Omaha. I don't now remember whether I gave any testimony in said cause or not. I do not know what were the issues in said cause, or what was the order of trial. I don't remember that I had anything to do with it, excepting to prove the claims referred to.

I filed my claims and let the referee decide on all the evidence in the case, to what class they belonged, and which of the parties were liable.

The claims I represented were all adjudged by the referee to be against the parties interested in the work done west of Elk Mountain, that is, Davis and Gessner. I don't know what Rogers did at said trial. I think he filed claims before the referee.

Cross-examination:

I read a copy of the million-tie contract in the printed bill of complaint furnished me by plaintiffs' attorney in the New York case.

Being a creditor, I was interested in investigating the matter, and did investigate it. I don't recollect that I ever saw the original contract itself. I am not a lawyer, and am not familiar with the technicalities of the

practice of law in New York. I suppose all the proceedings before the referee in the New York suit were carried on in accordance with the law, and were regular.

I don't recollect of being before the referee, except on proving my claims. No part of the claims proved by me before the referee ever belonged to Cornelius Christopher. I did afterwards purchase certain claims from Christopher, which he proved before the referee.

WILLIAM RUTH, being produced as a witness on behalf of the defendant Durant, at Denver, in the State of Colorado, on the 9th of March, A. D. 1877, testified as follows:

I am 52 years old, and live in Denver. Am not engaged in business at present. I know Rogers and Durant. I have been acquainted with them since 1868.

99 I was not a member of the firm of Hance & Ruth.

I was interested in the million-tie contract, and had a twentieth interest in it. I do not know personally how the ties furnished under it were distributed.

The work was done under the name of Davis, Sprague & Co., and all the work was done under this contract east of Elk Mountain.

Members of the firm were Davis, Sprague, Gessner, Durant, Mattox, Mrs. George Francis Train, and Richards.

I have no personal knowledge in regard to the furnishing of the ties beyond the million-tie contract, or who were the members of it.

I don't know who were the members of the firm of James W. Davis & Associates, but I do know that William F. Durant was not. He and I were only interested in the million-tie contract.

I had a conversation with James W. Davis, I think, in the latter part of May or June, 1868, as nearly as I can remember. He stated to me that he, Davis, had taken another contract from Doctor Durant, which had not anything to do or any connection with the million-tie contract; that he wanted to send Gessner to my store to buy some goods, and cautioned me very particularly to have the accounts kept separate, and not get them mixed up together, and said that I had no interest in this contract, and that none but he, Davis, had any interest in this contract, west of the Missouri River, and that Doctor Durant had his friends in New York, to whom he, Davis, was to give interest to. This conversation took place in the presence of my brother, Jefferson.

Cross-examination:

I have no personal knowledge as to the business of James W. Davis and Associates.

I never invested a dollar in the business of James W. Davis and Associates, but I paid $2,600 in the million-tie contract, doing its business in the name of Davis, Sprague & Co., and which stands charged against them on their account in my ledger, and which is a separate and distinct firm from James W. Davis and Associates.

I was not assigned a share in the business of James W. Davis and Associates. I never had but the one certificate, dated about November 20th, 1867, which I received from James W. Davis, in Omaha.

I never had any other interest but that certificate, alluding to the million-tie contract, and nothing else.

The business of the million-tie contract was done at or near Fort Saunders, in the name of Davis, Sprague & Co.

100 I don't know how vouchers were signed. I believe that the day-books, journals, ledgers, &c., were kept in the name of Davis, Sprague & Co., but I don't remember. They should appear so.

My authority for stating that the business was done in the name of Davis, Sprague & Co. is from my own books, and the fact that that is the only company that was interested in the million-tie contract.

I know that Durant had no interest outside of the million-tie contract, from the fact that James W. Davis had told me at the time the second contract was made that he was disconnected from the million-tie contract, and that no other person was interested in it but himself, west of the Missouri River, and from my own books and dealings I know that Durant had nothing to do with the other contract.

I have not said that Davis and Gessner were the only persons interested in James W. Davis & Associates, and I do not know it.

I do not know how much money was invested in the million-tie contract. I do not know any such thing, and that no one invested any money in it. I do know I put in $2,600.

W. F. Durant has not promised me that if he could get rid of Rogers' and other claims arising from the tie contract that he would see me paid the amount claimed as my share of the tie contract.

I did not claim to be a partner in the business of furnishing ties west of Elk Mountain, either directly or indirectly, and I had no interest in it. I had enough in the million-tie contract. Anything I told Mattox was concerning the million-tie contract; and if he says to the contrary, he is mistaken. Mattox always treated me, as a general thing, in a friendly manner.

Deposition of CLARK BELL, a witness produced on behalf of the defendant Durant, at the city of New York, March 12th, 1877, who testified as follows:

I am 44 years of age; by profession an attorney; live in New York. I know the parties to this suit above named—Rogers slightly, and the other two well.

I know of the New York suit, so called. I was attorney of record for plaintiffs therein, and I subsequently acted and appeared as attorney for some others of the parties. The cause was referred to A. A. Redfield, as sole referee, to hear and determine all the issues.

101 The action was analogous to what would have been called a bill in equity under our old practice, and was brought for the benefit of the plaintiffs and such others as should come in; and also for the benefit of the creditors of James W. Davis and Associates, Davis, Sprague & Co., or of the contractors for the construction of the Union Pacific Railroad.

A great variety of issues were tried and determined by the referee; some with and some without written pleadings. Of the latter class were the claims of A. M. Burnham, in which a great mass of testimony was taken, the claim of Henry J. Rogers, of Kountze Brothers, and many others. The pleadings in the action described the main issues.

In the cases of creditors and claimants, who appeared and proved their claims, the issues were usually in writing, and were:

1st. As to the correctness and validity of the claims themselves.

2d. As to whether they were claims properly chargeable against the contractors interested in what was known as the million-tie contract, or whether they were claims against the parties interested in what was known as the western work, or the work done west of Elk Mountain.

In the action, and all the proceedings before the referee, I claimed and insisted on behalf of the plaintiffs, the existence of these separate interests.

On the part of the defendants, Davis and Gessner, for whom J. M. Woolworth was attorney of record, and whose interests were also represented by Daniel W. Gillett, it was claimed and insisted that there was no difference in interests, and that the work done west of Elk Mountain was only a continuance of the million-tie contract, and that all the work was properly chargeable to the parties who had the million-tie contract.

These defendants, and many of the creditors, insisted that there was no division of interests between the work done west of Elk Mountain and east of it, and they sought to have all the claims charged against the parties interested in the million-tie contract, and to have no distinction made in regard to the distribution of the funds, but to divide equally amongst all the creditors alike.

It will be seen, by reference to the reports of the referee, how these questions were finally determined, and the nature and character of the various issues presented to him.

An order was entered in the case requiring the creditors of Davis, Sprague & Co., and James W. Davis and Associates to prove up their claims
102 within a certain time, and a large number of parties appeared, among them, Henry J. Rogers; that is, various claimants had different interests and made different claims.

Creditors, claiming against the work done in the million-tie contract would take a different view from those who had furnished supplies for the western work.

It was in issue, and considerable evidence was taken upon the question, as to what individuals composed Davis, Sprague & Co., and what James W. Davis & Associates, and also as to whether the two were one or two separate and distinct concerns.

Every claimant had an opportunity, and, in my judgment, the right to introduce evidence before said referee on any of these questions.

The whole cause was kept open, and each claimant had the right, until the referee reported finally, to avail himself of any testimony that had been previously given in the action, whether by another claimant or by either of the parties, plaintiff or defendant, not only as to his own claims, but as to all the issues, most of which affected each claimant in determining where his claim belonged, and how the distribution and liability should be finally determined.

My recollection is that Rogers appeared before the referee, both in person and by attorney, in support of his claim. I am unable to state what evidence he offered. I cannot state positively that Mr. Rogers or his attorney offered any documentary evidence upon the question of partnership. I think I remember seeing Mr. Rogers present before the referee. He seemed to identify himself with the defendants' counsel. Mr. Stiger, who represented him, was, I understood, in the office of Mr. D. W. Gillett.

The referee, for the convenience, and by consent of all parties, took testi-

mony at any time, on all or any of the issues, to suit the convenience of counsel or witnesses, and both he and counsel were very obliging in this case.

The whole case was held open by the referee on the issues, including the claims of creditors, for the reception of testimony, until he made his reports.

The different creditors had different views as to the identity of both concerns. There was a disposition, I think, among certain creditors to have their claims allowed against parties in the million tie contract, under the idea that the share would be larger than against those in the western work, and the claims would be better.

103 Cross-examination:

I have explained the various issues in the New York suit that were raised and adjudicated without written pleadings. The question of harmony never arose. I think they were in harmony with the written pleadings. Mr. Gillett was understood by me to have charge of the case, as attorney for the defendants, Davis & Gessner. Mr. J. M. Woolworth was the attorney of record, but as he lived in Omaha, Mr. Gillett acted here for Woolworth in his absence. I think he was familiar with the trial of the cause and with many of the issues, and in most respects with the whole course of the adjudication.

As I was plaintiff's attorney, seeking one result, and Mr. Gillett, the acting attorney of the defendants, stoutly contending and opposing me, I cannot say that we acted in accord. Truth would compel me to state the reverse.

Aside from our opposing interests, our intercourse was always courteous and polite, without any ill-feeling, and so far as I now recall, without misunderstanding. I am unable to state whether he and I understood the case and the issues alike.

In my opinion as an attorney, claimants in this cause did have the legal right, under the order you have referred to, and under our practice, to claim:

First. That their claim was only against the parties in the million-tie contract; or—

Second. That it was against the parties in the western work; or—

Third. That there was not two separate interests; or—

Fourth. As to what individuals composed or were liable either as firms or as adventurers; or—

Fifth. As to who were Davis, Sprague & Co., and who James W. Davis & Associates; or—

Sixth. As to how the funds should be equitably distributed; or—

Seventh. Any questions involved in this proceeding, which as it resulted, was mainly for the benefit of these very claimants.

In my opinion the validity of the claims, their proper classification, the determination of how the funds should be distributed among them, the liability of individual members of the contractors, under the million-tie contract, and on the western work, were the real object, mission, and essence of this suit, and were the main questions which it determines and settles.

104 I did not represent Mr. Rogers, and cannot state what inquiries he made. My statement that Rogers appeared before the referee

both personally and by attorney is true of my own knowledge, to the best of my recollection.

Mr. William E. Stiger appeared as attorney of record for Henry J. Rogers in the suit. I remember several instances in which claimants were sworn as witnesses in the cause upon other matters than upon the validity of their own claims, and I think both by the tie contractors and in behalf of the trustees.

I don't know that the referee's minutes of evidence were ever taken from his office. I don't know what became of them. I have not got them, and therefore cannot produce the same.

The main question in dispute between the parties to the record were not considered and substantially decided before the claims of the claimants were taken up for consideration. I never consented to allow Mr. Gillett to litigate the claims presented by Mr. Rogers. I always believed he was interested in the success of the Rogers claims. Mr. Gillett, however, never admitted to me that he was so interested, but I inferred it from the fact that his associate, Mr. Stiger, acted for Rogers. My relation to the Christopher claims did not differ from any other claims which I resisted. I conferred with Mr. Gillett whenever occasion required; I cannot say constantly. Our relations were as I have already stated.

So far as claimants went, I sought to inquire:

(1.) If the claims were valid.

(2.) So far as possible, to have them established against contractors in the western work.

(3.) To scrutinize with great care all claims sought to be charged against persons interested in the million-tie contract.

As to Gillett's position, as I understand it, it was identical with mine on the first point, as to the validity of the claims, but the interests of his clients were against mine in other respects. There was never, however, any personal misunderstanding between us in respect to the claim of any of the claimants, to the best of my knowledge.

I understand your question to ask for my legal opinion as to the effect of the final decree in that action.

I am clearly of the opinion:

(1.) That any claimant, under what is known as "Class I" of the
105 referee's report of November 16, 1871, could enforce his right specifically to his distributive share of the fund, and did establish his claim for the amount named against James W. Davis & James H. Gessner.

(2.) That any claimant specified in "Class II" of that report did thereby establish a claim against the persons interested in the million-tie contract for the total amount of his claim.

(3.) The judgment adjudicates and determines the rights of the claimants as to the amounts, as to who are liable and who are not liable, and it concludes all parties and claimants who appeared and proved their claims, but it is not a personal judgment, so far as to authorize the issuing of an execution to enforce it. It would require, in certain contingencies, provisional remedies to enforce it.

I have already stated all I know as to what Rogers or his attorney did in the cause.

Deposition of BENJAMIN F. BUNKER, produced as a witness on behalf

of the defendant Durant, in New York, March 14th, 1877, who testified as follows:

I reside in Brooklyn, and am a salesman in the straw goods business; have known the parties to this suit ten years or more. In 1867, 1868, and 1869, I was in Wyoming Territory, most of the time west of there, engaged on the line of the U. P. R. R. Co. by tie contractors. I know the firms of Davis, Sprague & Co., and James W. Davis & Associates, which are the names they were known by. Davis had made a contract with the trustees of the road, under date of December 3d, 1867, to furnish ties at various points along the road to the number of a million, and the contract was known as "the million-tie contract."

Davis assigned interests in his contract to Sprague, Mattox, Durant, Richards, Ruth, Gessner, Crane, as trustee for Mrs. Train.

The concern which carried out this contract was known as Davis, Sprague & Co., that being the one agreed upon by common consent. Its business was the furnishing of a million ties to the road, and that was its extent.

Before that contract was finished, Davis and Gessner, without
106 any written contract, undertook to furnish other ties to the trustees, and did furnish a large number, some of them before the completion of the million-tie contract, but most of them after. This concern, composed of Davis and Gessner, was known as "James W. Davis and Associates," and furnished a large number of ties for the road west of Elk Mountain. I don't recollect now just how many.

The million-tie contractors furnished their ties east of Elk Mountain. I know all the parties in both firms.

The business of Davis, Sprague & Co. extended to a point on the road called Elk Mountain. The ties they furnished tied the road from the eastern point, where they began delivery under their contract, to Elk Mountain. Their contract was for a specific number of ties, and Elk Mountain was the point on the road where that number reached.

James W. Davis and Associates delivered ties west of that to Echo Cañon, and some even west of that point. The only written contract was "the million-tie contract," which Davis, Sprague & Co. carried out. (A copy of said contract is attached, as Exhibit A, to the witness' deposition, and is the same as that set up in the answer of Durant, and shown in the New York record.)

I was employed by Davis, Sprague & Co. as cashier from about the beginning of their work until near the completion of their contract by the delivery of the million ties. I received moneys for them, drew checks, made deposits, and attended to their books and accounts.

P. S. Mattox succeeded me in charge of the books as cashier in July, 1868, and I was sent by Davis west of Elk Mountain to make contracts for ties for him. I did make contracts for him. Gessner was interested with him, and these two made up the firm of Davis and Associates.

These contracts made by me were for the firm of James W. Davis and Associates, with persons to furnish ties to said Davis and Gessner.

Their associates in the million-tie contract refused to have anything to do with this new business of Davis, and Davis would not let any of them, except Gessner, go in with him, as he said at the time.

Fort Saunders was the place of business of Davis, Sprague & Co. I kept their books, and for the most part disbursed their moneys, until Mr. Mattox succeeded me, as before stated. M. B. Sprague was the practical superintendent of their works and business. Davis had some charge, but generally he was at a distance, and wrote letters, or telegraphed.

Mattox, after the delivery of the million-tie contract was finished, was, by the direction of Davis, cashier and book-keeper of Davis and Associates.

107 Christopher was a clerk for Mattox, and after Mattox resigned, in February, 1869, I think, Christopher succeeded him as cashier and book-keeper for Davis and Associates, and was so from that time until all the ties were delivered by Davis and Associates, and possibly longer, but the road was completed in May, 1869.

The places of business of James W. Davis and Associates were Benton City, Green River, Tie Siding, and Bear River, All said points are west of Elk Mountain. Gessner superintended at Benton City, and then left there and went to Green River in charge of that place and points west, until Mark Seymour came out with authority from Davis, as superintendent of all the work of Davis and Associates. Seymour appointed Hopper superintendent at Fort Bridger and Bear River. I assisted Seymour for a time, and was then put in charge of the outfit at Green River, to get out ties for James W. Davis and Associates, by Seymour's orders.

The million-tie contract in fact extended westward to Elk Mountain, as stated before. The ties were delivered at the Black Hills, Summit Station, Dale Creek, Fort Saunders, Big and Little Laramie Rivers, and Cooper's Creek, points along said railroad, westward to Elk Mountain.

Davis and Gessner, outside of and beyond the million-tie contract, furnished a large number of ties. No one else was interested to my knowledge. They had simply a verbal agreement with T. C. Durant, as general manager for the trustees, to pay Davis and Gessner for what ties they got out and delivered.

William F. Durant had nothing to do with any contract or arrangement in regard to ties outside of the million-tie contract.

Davis and Gessner both told me when they commenced furnishing ties outside of that contract, that Durant and the others who were in the million-tie contract, were not interested in the new enterprise, and I also know the same fact from the other million-tie contractors, and from other sources. I worked for both concerns and know who employed me.

I know of what is called the New York suit. I acted as clerk for Redfield, and took testimony for him, and kept the minutes of the trial, and had charge of papers, claims, &c., filed, and was present at the trial. I filed two claims in the cause for myself, one against Davis, Sprague & Co., the million-tie contractors, and another against James W. Davis and Associates, both of which appear in the referee's report. These claims were for services, &c. I was also clerk for Mr. Bixby, the receiver in that cause.

There was a fight between the members of Davis, Sprague & Co., and James W. Davis and Associates. The first firm claimed that the last owed them a large amount of money. Davis and Gessner claimed that

108 the firms were the same in fact, it having become apparent that

the million-tie contractors had made a large sum of money, and that the work outside of that had been done at a great loss. This issue was testified about early in the case, and was prominent.

Then an order was made to bring in creditors of both firms, and this order was published, and under it a great many claims were filed, and question was made as to their amount, and against which firm they should be allowed, if either, and in this was the other question, whether both firms were the same thing. Then a third question arose as to the amount due by the trustees for building the road.

There was no fixed order for trial in finishing up any one question, and then taking up another. Many of the witnesses lived at a distance, and as they came to New York, or as their counsel found it convenient, their testimony would be taken, without reference to which branch it specially applied. The first testimony taken, as I remember, was as to the accounts between the firms, and who composed them. Then when claims were presented under the order of the court, further testimony was allowed on this question, and so all through the case. The last part of the testimony, as I remember, was in relation to the amounts due to each firm. But the referee determined, in his two reports, dated the 9th and 16th of November, 1871, the questions as to the two firms, and who were the members of each, and the amounts, and from which firm the claims were due; and in March, 1872, the referee, by his report, found the amounts due from the railroad trustees. Mr. Rogers, the complainant, was present many times before the referee, and testified more than once on the hearing, and testified about the claims he presented.

He presented before the referee two claims against Davis, Sprague & Co., for signing appeal bonds on some appeals from judgments in the case of Collins against Davis, Sprague & Co., and another in the case of Lowry & Upton against Davis, Sprague & Co., but for some reason, or some informality, these claims were withdrawn by Mr. Rogers. He also presented claims against James W. Davis & Associates.

I think his testimony was mostly, or perhaps entirely, in reference as to whether he owned those claims or held them as collateral, the amount of them, and matters of that nature. (The witness attaches as exhibits the affidavits offered by Mr. Rogers on the hearing before the referee, and a copy of the minutes of his testimony and proceedings in reference to his claims, as Exhibits B and C, which are as follows:)

Extract from minutes of referee, showing the testimony of H. J. Rogers.

109 "The following acceptances are admitted:

"Jan. 2, '69.	.....	$232	82
"Jan. 2, "	M. Quillan.....	314	13
"Jan. 2, "	M. V. Lee	128	55
"Jan. 2, "	Crawford	300	00
"Jan. 2, "	Biggers.....	295	06
"May 28, "	H. Robinson.....	157	05
"Jan. 4, "	Mansfield	638	96
"Feb. 21, "	S. K. Dey.....	311	00
"Ap'l 13, "	J. McIntyre.....	250	00
"Jan. 2, "	Mansfield	189	80

"Jan. 3,	"	S. Hause	100 00
"Sep. 2,	"	Rogers	150 00
"Dec. 5,	"	Corlett	250 00
"Jan. 21,	"	Rogers' balance	584 52
"May 8,	"	F. Haggerty	388 45
"May 17,	"	Brush	99 35

"Transcript of judgment record, November 26, 1870, Lowry & Upton against Henry J. Rogers, for $3,199.83, on account of Davis, Sprague & Co., on an undertaking, an appeal, together with a certified copy of judgment roll.

"Transcript of judgment record, November 30, 1870, by J. W. Collins against Henry J. Rogers, for $2,107.42, on account of Davis, Sprague & Co., on an undertaking, an appeal, together with a certified copy of judgment roll.

"Two affidavits of H. J. Rogers, made Feb. 23, 1871, as to the recovery of the aforesaid judgments and payments on account thereof.

"The amounts of the judgments stated in the affidavits vary from the amounts as appear by transcript.

(Objection by defendants.)

"Rogers must prove that he has paid the judgments before it can be finally passed as against defendants. Necessary time given for such proofs.

"The following additional claims are admitted:

"May 28, '69.	Wyatt & Jones		$1,038 02
" 31, "	A. H. Hayett		71 69
"Ap'l 12, "	C. A. Henry		888 38
"Nov. 26, '70.	Bill of Hutchinson		5 00
"May 17, "	"	"	3 55

JULY 20, 1871.

110 ROGERS & CO. CLAIM.

Bank acct. The amount allowed Rogers & Co., by consent, $1,583.99.

Rogers withdraws any claim on the 2 judgments in favor of Collins, $2,107.42.

On the judgment in favor of Lowry & Upton. $3,199.83.

"Rogers & Co. submits claim of Mark Parish, $133; int. from June 1st, 1869.

"CHRISTOPHER sworn:

"To the best of my knowledge, information, and belief, this is a valid claim.

"As to the two judgments of Lowry & Upton and Collins, it is stipulated that the claim shall be allowed, to the extent of the payments actually made by Rogers on account of them. Proof of such payments to be furnished by Rogers & Co.

"JULY 20.

"Rogers & Co.'s counsel submit the affidavits of H. J. Rogers, and Jonathan E. Wild, as to amount of advance made by Rogers on $10,000 Henry d'ft $5,376. Davis consents to allow that sum with interest from May 12, 1871.

"A. A. R."

"TERRITORY OF WYOMING,
"*County of Laramie, ss:*

"I, Henry J. Rogers, of Cheyenne City, in said county, of lawful age, being first duly sworn, on my oath do depose and say, that C. A. Henry and John H. Young, the parties who formerly comprised the firm of John H. Young & Co., are justly and truly indebted to the firm of Rogers & Co. in the sum of $5,376 upon an account of moneys loaned by the said firm of Rogers & Co., to the said firm of Henry & Young at their request; that the claim against Davis and Associates in this action, which is evidenced by the paper showing a balance of $10,000 due thereon, is held by the firm of Rogers & Co., as collateral security to secure the payment to Rogers & Co. of the said indebtedness of $5,376 from said Henry & Young, and has been so held by said firm of Rogers & Co., ever since the same was first made and delivered; that neither the said Henry nor Young have ever held said paper; that the same was made and delivered to said firm of Rogers & Co. by C. Christopher esq., the cashier of Davis and Associates, in exchange for an order drawn by said Davis and Associates on one Kennedy, the cashier for S. B. Reed, superintendent of construction of U. P. R. R. at Echo, in favor of the firm of J. H. Young 111 & Co., for the sum of $22,738.79, and that the said firm of Rogers & Co. have so held the said paper ever since the same was so made and delivered. That said John H. Young & Co. claim from said Rogers & Co., the difference between the said sum of $5,376 and $10,000, the balance appearing due upon the said paper, and do not claim any other interest in, or title thereto.

"Affiant says that he has told James W. Davis, of the said firm of Davis and Associates, that he held the said paper as collateral security, and that affiant so understands the matter now, and has above stated the facts in relation to his title thereto. Affiant further says that no advances have been made upon said paper since affiant was informed that offsets and counter-claims were claimed against the same.

"HENRY J. ROGERS.

"Subscribed and sworn to before me this 12th day of May, 1871.
"[SEAL.] J. W. HUTCHINSON,
"*Clerk District Court.*"

JULY 20, 1871.

Parties present.

Rogers & Co. withdraw claim on account Hutton, $1,306.51, the acceptance to remain in the hands of the receiver.

Jno. Brown claim, $301.60; Rogers & Co. agree to take $25, amount of advance.

SEPT. 16, 1871.

Rogers appears to prove claim of R. S. Van Tassel, $2,188.54.

"ROGERS:

"I reside Cheyenne; I am a banker; this draft I bought after it was due and protested. I bought it some time in July or August, 1870, from a gentleman in Denver, whose name I cannot now recall. I paid value

for it. I am still the owner and holder of it. I never told Davis that I held it as security for an advance made to Van Tassel. Van Tassel wanted me to buy it before it became due, but I refused. He sold it to Wilson before maturity, and Wilson sold it to the person I bought it from. I had this paper here last fall; I did not take this paper as collateral; I purchased it absolutely.

"H. J. ROGERS."

"Mr. ROGERS:

"I was not in N. Y. last fall; was not here in November or December; I had conversation with Sprague some time in February, 1871, about many subjects; never made any statements to Sprague that I held that paper as collateral. Remember showing Sprague same paper. No such
112 conversation ever occurred between us. Told Sprague that Van Tassel held other paper, that he could get offset, but that I owned this paper.

"H. J. ROGERS."

On the point of the order of trial, I have a copy of the affidavit made by J. H. Hughes, mainly in reference to the claim of Burnham, but it says something in reference to the order of trial. (The witness attaches the same to his deposition as Exhibit K.) The case was kept open until the referee's report, and each party, claimant or otherwise, could offer evidence as they saw fit.

As I stated before, Mr. Rogers had claims against both firms, and presented them before the referee. I do not understand that he made any effort to have claims which were against Davis, Sprague & Co., allowed against Davis and Associates or the reverse, but it was understood by him and every one else, that Davis, Sprague & Co., the million-tie contractors had made more than enough to pay all their debts, and that Davis & Associates were largely behind, and that their creditors would lose heavily. This was made known when the suit was commenced, and the effort and interest of Davis and Christopher was to make the two firms the same.

Rogers was with Davis and Christopher most of the time the trial was going on, during the time he was here in New York, and they were continually consulting together about the issues. This was resisted by the parties who had the million-tie contract, and who composed Davis, Sprague & Co., and by their creditors and all through the case this was an issue that took up a great deal of time, and was thoroughly contested.

The witness is asked to state what he knows in reference to the several pieces of commercial paper described in the bill in this case.

The WITNESS. The original checks and drafts referred to were all presented by Mr. Rogers to the referee on trial, and left with him. These claims are the same as those specified in the referee's report as allowed to Rogers. There are differences in the amounts between the face of some of the claims and the referee's reports, because credits were proved on some of the claims. I suppose all of these papers must have gone to the receiver, and I will look for them if it is desired. I have already stated all I remember about what Rogers did on the hearing before the referee. I know nothing personally about the origin of these claims apart from the evidence on the trial before the referee and the examination of the books. These claims were all presented by Rogers in the New York case.

113 When I took charge of the cash, &c., for Davis, Sprague & Co., at the commencement of the million-tie contract, I opened an account for them with Kountze Brothers & Company, at Cheyenne, in my own name, as "B. F. Bunker, cashier." That account was so kept, and checks drawn on it, to my knowledge, until Mr. Mattox succeeded me, as before stated. All the moneys for the million-tie contractors were so deposited, so far as I know, during my stay, and I had sole charge of those matters during that time.

As to the payment by T. C. Durant to Rogers of drafts, to the amount of a hundred and six thousand dollars, or thereabouts, in May, 1869, all I know about it is what Mr. Rogers, the complainant, told me. I was not present when the drafts or money were paid over. Mr. Rogers told me, I think, early in June, 1869, that he had received thirty and sixty day drafts from the trustees, to the amount of one hundred and six thousand dollars, I think it was, the proceeds of which were to be paid out for James W. Davis & Associates, on claims against them, many of which Rogers held.

Davis, Sprague & Co. kept their account with Kountze Brothers & Company, as I have explained. Davis and Associates kept their accounts with them, also, the first part of the time, and afterwards with Rogers & Co., and checks were drawn mostly by Mr. Mattox, and after he left, by Christopher. Their account was kept in the name of Davis & Associates.

I remember about two notes made by Davis, Sprague & Co., amounting to about twenty thousand dollars, and sent for collection to Rogers & Co., or H. J. Rogers & Company, for collection. They were given, I think, to Captain Reed, of Denver, in payment of an ox train, bought from him, and were made payable at Kountze Brothers' banking house, in Cheyenne, and were, when due, charged to my account, by my direction, and afterwards replaced by check on the same concern, and the notes were filed away in the Fort Saunders office. These checks were not signed by James W. Davis and Associates, by P. S. Mattox, cashier. They were signed by me, as cashier. They were the only notes of this amount given by Davis, Sprague & Co., to the best of my recollection, and were paid by Davis, Sprague & Co., as stated.

I remember of the opening of the lumber yard, in 1868, when W. F. Durant was present. It was at Fort Saunders, not at Laramie City. The lumber was received from the mills belonging to Davis, Sprague & Co., and was their lumber. I assisted in arranging it, and so did W. F. Durant.

Laramie City is two or three miles beyond Fort Saunders.

114 There was no lumber yard opened at Laramie City at which Durant was present, but at Fort Saunders, where Davis, Sprague & Co. had their office.

I know of receipts signed by Mr. Rogers to each of said firms, and attach some of them, made to Davis, Sprague & Co., and mark the same Exhibits D 1, D 2, D 3, and D 4, respectively. The one dated September 22d, 1868, and the one dated October 30th, 1868, are signed by the complainant himself. Said exhibits are as follows:

EXHIBIT D 1.

$830.06.] SEPT. 22D, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad,

eight hundred thirty $\frac{06}{100}$ dollars, on ac. M. T. Seymour, agt., acceptance. Ck. 187, No. 1044.
No. 1044.] ROGERS & CO.

EXHIBIT D 2.

$1,602.90.] OCT. 30, 1868.
Received of Davis, Sprague & Co., for building Union Pacific Railroad, sixteen thousand two $\frac{90}{100}$ dollars, on acc't R. J. Reed & Co., d'ft of Oct. 26. Ck. 278.
No. 1462.] ROGERS & CO.

EXHIBIT D 3.

$200.] OCT. 27, 1868.
Received of Davis, Sprague & Co., for building Union Pacific Railroad, two hundred $\frac{}{100}$ dollars on acc't Jas. W. Davis, d'ft for wife, Oct. 20. Ck. 272.
No. 1441.] H. J. ROGERS & CO.

EXHIBIT D 4.

$2,783.10.] OCT. 27, 1868.
Received of Davis, Sprague & Co., for building Union Pacific Railroad, twenty-seven eighty-three $\frac{10}{100}$ dollars on acct. G. W. Frost, purchase d'ft of H. S. Jackson, Oct. 15. Ck. 271.
No. 1440.] H. J. ROGERS & CO.

Davis, Sprague & Co., after a time, had books of receipts printed, which were used in their business. At first they took written receipts, numbered consecutively, and these numbers continue in their printed receipts. I annex several of their printed receipts hereto, and mark the same Exhibits E 1 to E 10, inclusive, respectively. Said exhibits are as follows:

115 EXHIBIT E 1.

$10.] AUG. 21, 186 .
Received of Davis, Sprague & Co., for building Union Pacific Railroad, ten dollars.
No. 437.] JAMES W. DAVIS,
For D., S. & CO.

EXHIBIT E 2.

$100.] AUG. 22, 186 .
Received of Davis, Sprague & Co., for building Union Pacific Railroad, one hundred $\frac{}{100}$ dollars.
No. 742.] JAMES W. DAVIS.

EXHIBIT E 3.

$100.] AUG. 19, 186 .
Received of Davis, Sprague & Co., for building Union Pacific Railroad, one hundred $\frac{}{100}$ dollars.
No. 718.] C. CHRISTOPHER.

EXHIBIT E 4.

$50.] AUG. 10, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, fifty $\frac{00}{100}$ dollars, on acct.

No. 591.] C. CHRISTOPHER.

EXHIBIT E 5.

$4,000.] AUG. 17TH, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, four thousand $\frac{00}{100}$ dollars, on acc't.

No. 661.] A. M. BURNHAM.

EXHIBIT E 6.

$2,000.] AUG. 11TH, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, two thousand $\frac{00}{100}$ dollars, acc't Big L. John Wanless & Co.

No. 593.] ALEXANDER STEELE.

EXHIBIT E 7.

$724.31.] AUG. 12, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, seven twenty-four $\frac{31}{100}$ dollars, to balance acc't.

No. 598.] LOWRY, BEALL & CO.

116 EXHIBIT E 8.

$1,200.] AUG. 18, 186 .

Received of Davis, Sprague & Co., for building Union Pacific Railroad, twelve hundred $\frac{00}{100}$ dollars, pay-roll; additional am't of about $100 to pay discharged men, if necessary.

No. 710.] A. C. AMER.

EXHIBIT E 9.

$1,000.] SEPT. 17, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, one thousand $\frac{00}{100}$ dollars on acc't, by check 165, to close acc't Geo. Graham.

No. 1039.] GEORGE GRAHAM.

$1,229. C'k 166.] SEPT. 17, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, twelve hundred and twenty-nine $\frac{00}{100}$ dollars, Seargent & Co., acc't hauling.

No. 1040.] GEO. H. SEARGENT & CO.

EXHIBIT E 10.

$50.] AUG. 18, 186 .

Received of Davis, Sprague & Co., for building Union Pacific Railroad, fifty dollars, ex. acc't.

No. 713.] G. G. IREDELL.

These receipts are filled up by Mr. Christopher, and are the original papers, and the genuine signatures of the signers are affixed thereto. Afterwards, Davis and Associates used the same blanks for their business, erasing the name of Davis, Sprague & Co., and inserting their own in writing. Here are some of the originals, which I attach and make Exhibits F 1 and F 2. The filling up of these, as well as the erasure and the insertion of "Associates," are in the handwriting of E. W. Winters.

Said exhibits are as follows:

EXHIBIT F 1.

$36 50
50 37

$86 87

DEC. 31, 186 .

& Associates,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad, eighty-six $\frac{87}{100}$ dollars, tie acc't, Barker, payable to

No. 393.] W. D. CAMERON.

117 $197.05 ties.
22 days' labor.

$219.05

DEC. 31, 186 .

& Associates,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad, two hundred & nineteen $\frac{05}{100}$ dollars, tie acc't, Rundle orders on f.

No. 394.] CHAS. his + mark. THOMPSON.

$36.] DEC. 31, 1868.

& Associates,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad, thirty-six $\frac{}{100}$ dollars, "tie-cutting" acc't.

No. 395.] CHAS. his + mark. THOMPSON.

EXHIBIT F 2.

$1,419.26.] JAN'Y 14TH, 1869.

& Ass'tes,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad,

fourteen hundred & nineteen $\frac{26}{100}$ dollars. "Hopper's train." Pay-roll of men taking train to winter quarters at Promontory P't, on file with Jan'y "pay ticket." I certify that the above is correct.

No. 467.]

$100.] JAN'Y 15, 186 .

& Ass'tes,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad, one hundred $\frac{}{100}$, dollars, tie acc't, Rundle.

No. 468.] FRANK McCURRAN.

$44.34.] JAN'Y 15, 1869.

& Ass'tes,

Received of Davis, ~~Sprague & Co.~~, for building Union Pacific Railroad, forty-four $\frac{34}{100}$ dollars, tie acc't, Rundle. P'd by c'k on Wilson & M., No. 9 voucher on file. O. Neville.

No. 469.] E. W. WINTERS,
Ass't Cash.

When these blanks were used up, the concern of Davis and Associates used blanks with their own name printed on them.

Witness produces certain original papers put in evidence, marked Exhibits G 1 to G 5, inclusive, which are as follows, respectively:

118 EXHIBIT G 1.

.....Acc't.

Messrs. Jas. W. Davis and Associates, to James W. Davis.

Charged to	1869.		*Dolls.*	*Cts.*
		To am't on acc't of exp's	250	00

Date: OMAHA, *Nov.* 5, 1869.

Received of Jas. W. Davis & Associates, two hundred fifty dollars ($250), in full of above account.

JAMES W. DAVIS.

EXHIBIT G 2.

.....Acc't.

Messrs. James W. Davis and Associates, to Jas. H. Gessner.

Charged to	1869.		*Dolls.*	*Cts.*
		To am't on acc't for expenses.....	300	00

Attached to above is the following:

OMAHA, NEB., *Sept.* 25, 1869.

Received of A. Kountze, cash. First Nat. Bank, three hundred dollars,

for use of Davis & Associates in attending to business of said firm. You are hereby requested to charge the firm of Davis & Associates for the above amounts on your books.

Paid $300.

DAVIS & ASS'T'S,
By J. H. GESSNER.

EXHIBIT G 3.

.....Acc't.

Messrs. Jas. W. Davis and Associates, to C. Christopher.

Charged to	1869.		Dolls.	Cts.
		To am't on acc't	346	98

Date: OMAHA, *Jan'y*, 1870.

Received of Jas. W. Davis & Associates three hundred forty-six $\frac{98}{100}$ dollars ($346.98), in full of above account.

C. CHRISTOPHER.

119

EXHIBIT G 4.

.....Acc't.

Messrs. Jas. W. Davis and Associates, to Ed. W. Winters.

Charged to	1869.		Dolls.	Cts.
		To am't on acc't for exp's to be acc't for.....	200	00

Date: 186 .

Received of Jas. W. Davis and Associates two hundred $\frac{00}{100}$ dollars ($200), in full of above account.

E. W. WINTERS.

EXHIBIT G 5.

.....Acc't.

Messrs. Jas. W. Davis and Associates, to W. Zacharias.

Charged to	1869.		Dolls.	Cts.
		To cash to close..... Rogers' c'k	99	35

Date: PIEDMONT, *May* 17, 1869.

Received of Jas. W. Davis and Associates ninety-nine $\frac{35}{100}$ dollars ($99.35), in full of above account.

W. ZACHARIAS,
P'r T. C. BRUSH.

These receipts are signed by the parties, and are filled up by Christopher. There were hundreds of such receipts.

Witness also produces certain drafts, marked H 1 and H 2, and states: These are original drafts on Davis, Sprague & Co., accepted by James W. Davis in his own handwriting for the firm, and received, as per the written receipt on the back of them, by Rogers & Co. The complainant was a member of that firm, and the receipt is in his writing, I believe.

Said exhibits are as follows:

EXHIBIT H 1.

$971.79.] CHEYENNE, *May 8th*, 1868.

Sixty days after date, pay to the order of McDonald & Company nine hundred and seventy-one $\frac{79}{100}$ dollars, value received, on c't of estimate on lumber and tie contract.

A. G. LATHROP & CO.

To Messrs. DAVIS, SPRAGUE & Co., *Ft. Saunders, D. T.*

120 (Endorsed on back as follows:) $971.79. A. G. Lathrop & Co. McDonald & Henry, d'ft. July 9th, 1868. McDonald & Henry. Rec'd payment.

ROGERS & CO.

EXHIBIT H 2.

$2,767.] CHEYENNE, D. T., *May 14th*, 1868.

Sixty-five days after date, pay to the order of R. J. Reed & Co. twenty-seven hundred and sixty-seven dollars, value received, and charge the same to account of—

H. A. HANCE.
JAMES D. HALL.

To Messrs. DAVIS, SPRAGUE & Co.

(Endorsed as follows, on back:) $2,767. D'ft of Hance, Hall & Co. P'd July 18. R. J. Reed & Co. Rec'd pay.,

ROGERS & CO.

I know that Lowry and Upton had a judgment against Davis, Sprague & Co. They were at North Platte, the same as Benton City, which is west of Elk Mountain, and had some transactions about ties with Gessner, who was at that point as agent for Davis and Associates. Any ties which they delivered were delivered to Davis and Associates, and not to Davis, Sprague & Co., and no indebtedness ever accrued to them from Davis, Sprague & Co. for ties or material furnished them. Davis, Sprague & Co. had no transactions with them.

Cross-examination:

C. Q. "Does it not occur to you as rather a strange circumstance
121 that you should be selected by the defendant to prove his entire case from stem to stern, in all its details and ramifications, when James W. Davis, who knows all about it, is entirely ignored?

A. "I don't know that Mr. Durant expects to prove his case by me, as the question assumes. Rogers, the plaintiff, took my deposition once in this case, and it didn't seem strange then, nor that Mr. Durant asks i

now. I am willing to tell what I know to either party. I know nothing about ignoring Mr. Davis, or what is meant thereby."

I knew, at the time the million-tie contract was made, who made it, and afterwards to whom the interests were assigned. I opened the ledger in the name of Davis, Sprague & Co., and had that name printed on the back of it, thus: "D., S. & Co." I kept their books, received and disbursed moneys and receipts for them.

I knew who were members of Davis and Associates, and that their business was distinct from the other firm.

Davis and Gessner told me that they were the only members of that firm. I was told the same by W. F. Durant, Mattox, Sprague, and others of the old concern. I know it from being in their employ and seeing their receipts and dealings. I was on the ground of the operations of both these firms from the beginning to the close, and gained my information there, from actual contact with the parties.

I know the extent of the business of each firm from being there at the time. We knew how many ties were used to each mile of road, and knew to what point they would extend. After I ceased to be book-keeper and cashier, my position was not subordinate.

I was employed by the firm of James W. Davis and Associates in the first place, as superintendent of their whole work west of North Platte, and, after Seymour's appointment, was acting under his orders, and was in personal connection with the whole work, including book-keepers, cashiers, and managers—with most everybody connected with the work.

My statements on page six, as to places of business of these firms, and who kept their books, &c., are based upon personal knowledge, and not upon hearsay.

The firm name of Davis, Sprague & Co., was used in purchasing supplies of dealers, and keeping accounts of ties, on vouchers or receipts from men or persons to whom payments were made. I referred to receipts in my direct examination which will show this, and also have here four vouchers showing for themselves, which are marked, Exhibits I 1 and I 2, J 1 and J 2.

122 Said exhibits are as follows:

EXHIBIT I 1.

UNION PACIFIC RAILROAD,
TIE AND LUMBER DEPARTMENT,
McFadden Gulch, May 29, 1868.

Paymaster of Messrs. Davis, Sprague & Co.:

Please pay the bearer, Mr. Douglass, for six days' services during the month of May on mill, at $3 per day:

Amount	$18 00
You have the board. Retain for board due Jas. Dove	2 30
Balance due	$15 70

Correct:

A. C. AMER, *Foreman.*

(Endorsed as follows on back:) Pay to Jno. Wanless & Co.
C. P. DOUGLASS.

The contractors for building the Union Pacific Railroad, to Mr. Douglass, Amer's Mill, Dr.

Charged to	186 .		Dolls.	Cts.
		To cutting ties, in full of acc't	15	70

Dated Fort Sanders, July 1, 1868.

Received of the contractors for building the Union Pacific Railroad, fifteen $\frac{70}{100}$ dollars, ($15.70), in full of above account.

JOHN WANLESS & CO.

EXHIBIT I 2.

UNION PACIFIC RAILROAD,
TIE AND LUMBER DEPARTMENT,
June 31st, 1868.

Paymaster of Messrs. Davis, Sprague & Co.:

Please pay the bearer, William Wain, for 45½ days' services during the month' of May and June on tie acc't, at 1.92 per day:

Amount	$87 06
Retain board due	9 70
Balance due	$77 36

Correct:

R. S. VANTASSEL,
Foreman.

123 *The contractors for building the Union Pacific Railroad, to Wm. Wain, Dr.*

Charged to	186.		Dolls.	Cts.
		Tie acc't bal., due for labor at Van Tassels	77	36

Dated Fort Saunders, July 3, 1868.

Received of the contractors for building Union Pacific Railroad seventy-seven $\frac{36}{100}$ dollars ($77.36), in full of above account.

WILLIAM WAIN.

EXHIBIT J 1.

UNION PACIFIC RAILROAD,
TIE AND LUMBER DEPARTMENT,
June 29th, 1868.

Paymaster of Messrs. Davis, Sprague & Co.:

Please pay the bearer, Peter Etne, for 22½ days' services during the month of May on tie acc't, at $1.92 per day:

Amount	$43 20
Retain for board	
Balance due	$43 20

Correct:

R. S. VANTASSEL,
Foreman.

The contractors for building the Union Pacific Railroad, to Peter Etne, Dr.

			Dolls.	Cts.
Charged to	186 .	Tie acc't	43	20

Dated Fort Saunders, July 3, 1868.

Received of the contractors for building the Union Pacific Railroad forty-three $\frac{30}{100}$ dollars ($43.30), in full of above account.

his
PETER + ETNE.
mark.

124 EXHIBIT J 2.

UNION PACIFIC RAILROAD,
TIE AND LUMBER DEPATMENT,
June 28, 1868.

Paymaster of Messrs. Davis. Sprague & Co.:

Please pay the bearer, Joseph Bodro, for 7½ days' services during the month of May on river drive, at $3.00 per day.

Amount $22 50
Retain board due.....
Balance due .....
Correct:

R. S. VANTASSEL,
Foreman.

The Contractors for building the Union Pacific Railroad, to J. Bodro, Dr.

			Dolls.	Cents.
Charged to		To an acc't	2	50

Dated Fort Saunders, July 3, 1868.

Received of the contractors for building the Union Pacific Railroad, two $\frac{50}{100}$ dollars ($2.50), in full of above account.

JOSEPH BODRO.

Vouchers for ties were not given by the Union Pacific Railroad Company.

Monthly estimates for ties were made out by the engineer, and the cashier of the contractors paid me, for Davis, Sprague & Co., moneys due that firm for ties on those estimates. I receipted to him in the name of Davis, Sprague & Co. That was my method of doing the business.

James W. Davis signed the million-tie contract for himself and associates. There were no associates then, but he afterwards assigned interests in this contract to the persons before named, who thereby became his associates, and then agreed on the name Davis, Sprague & Co., and used it in their business in carrying out said contract.

The books in which the accounts of these million-tie contractors were kept were the books of Davis, Sprague & Co.

The names of other persons who dealt with that firm appeared on those

books, and I do not remember any charges or credits in those books to Davis, Sprague & Co. Their names only appeared, if at all, as owners of the books.

I remember, on the back of the ledger was printed, "Davis, Sprague & Co.," or "D., S. & Co."

125 The business was done in the name of Davis, Sprague & Co. There may have been some confusion or mistakes made, from the fact that Davis and Gessner commenced the business of the firm of James W. Davis and Associates before Davis, Sprague & Co. had completed their business, but I do not now recall any.

The authority I have for my statements is from my own knowledge.

I do not swear that the million-tie contract, by its terms, extended to any place, but that the million-tie contractors, in complying with their contract, furnished ties from where they started westward to Elk Mountain.

That was where Davis, Sprague & Co. stopped and the other firm began.

I was on the ground and engaged in the business, and knew that the million of ties covered so many miles, and that they extended to Elk Mountain. James W. Davis and his associates, who made the firm of Davis, Sprague & Co., did commence to deliver ties under the written or million-tie contract referred to. After reaching Elk Mountain, as the million ties had been delivered and their contracts performed, this association stopped.

The same James W. Davis and one of his former associates, Gesner, then delivered ties from Elk Mountain westward until the work was completed, under the firm name of James W. Davis and Associates, without any written contract as to numbers or price, as I understood it. The price was to be fixed by the trustees from time to time.

The bid for this contract was signed by James W. Davis for self, Sprague and others. When the contract was signed, it was signed by Davis for self and associates, he not knowing then who all his associates would be.

The interests of others were assigned afterwards by Davis to the persons who composed Davis, Sprague & Co. The assignments were dated back to cover the commencement.

Davis, Sprague & Co. had some ties left over and not used in the million-tie contract, and sold some of them to James W. Davis and Associates, and that was part of the claim allowed Davis, Sprague & Co. by Mr. Redfield, the referee, against Davis and Associates.

Davis, Sprague & Co. only delivered one million ties to the trustees, according to the contract, and then the contract terminated. The surplus they sold to Davis & Associates, at least some of them. They may have sold some surplus ties to the railroad company, and I think they did.

126 When the last ties of the million were delivered I was working for Davis & Associates, out on the line of the road. I learned of these matters at the time of the performance and delivery.

I knew about the business of James W. Davis & Associates from being employed by them, and being on the ground, and in other ways that I have stated before.

I never was a lawyer, and am not familiar with the technicalities of New York practice.

I learned about the issues that were tried in the New York suit, at the time of the trial before the referee, from hearing papers read, statements and arguments of the lawyers and parties, and from copying minutes of the trial, as above explained. I have no other information.

I think that Mr. Rogers' attorney, or myself, would be equally competent to state what Rogers did at said trial, when both of us were there. I was present, and took the offers and testimony drawn, and the lawyer managed Mr. Rogers' case, and would know more about the law points than I; but as to what was said or done at that trial, I don't know that there would be any difference, except that Rogers was sometimes there when his attorney was not. I don't know of any contradiction between either Mr. Stiger, or Mr. Gillett, or myself, and hope there is none. If there is, you must use your own judgment as to which is correct. I cannot tell what you had better do about it.

What I know about Rogers' private affairs is from what I learned from his statements, and from what happened on the trial. I never was his confidential bookkeeper, or specially intimate friend. I knew him. He did not inform me about all his business.

I think I was present in the New York suit, at least at every hearing where testimony was taken, while the trial was going on.

I may not have been present at all the arguments, but I think I was.

It was my only business at the time, and I attended to it.

I did not state that Rogers directly attempted to get any claims allowed against Davis, Sprague & Co. These claims were all drafts or checks, which were against James W. Davis and Associates on their face. The two claims Rogers did present to Davis, Sprague & Co., were for signing appeal bonds on judgments, but Rogers withdrew those claims. I do not think his attorney was then present. That was before the referee—during the trial. I cannot give the date, but must refer you to the exhibits I produce.

Rogers appeared before the referee, and, I think, made some oath,
127 or gave testimony in reference to the two claims against Davis, Sprague & Co. They were afterwards withdrawn.

I cannot give any fuller history than this and what I have already stated. I cannot tell you whether there was any legal authority under the order on claimants for the attempt or failure on these claims. I do not know anything about the legal propriety of the order referred to, or legal matters anyhow.

I was first informed about the drafts, of about one hundred and six thousand dollars, by Mr. Kennedy, cashier for the trustees. Christopher also told me about it. There was $50,000 in money sent from Echo to Piedmont, to pay off the men at the time the trustees were corralled.

It was counted, placed in a bag, and sent by a special messenger from the cashier's office to be used in paying off the men under the direction of Rogers and Christopher. Rogers told me about the drafts for $106,000 about a month after the occurrence, in his banking house at Cheyenne. I was not present when the drafts were delivered. I saw the money put up and sent by a special messenger for the purpose stated. I did not hear it from T. C. Durant alone.

Bank checks were drawn in the name of Davis, Sprague & Co., through

their authorized cashier, B. F. Bunker, on Kountze Brothers & Co. in Cheyenne.

In November, 1876, I had custody of the books of account of James W. Davis & Associates, in New York, as the clerk of the receiver; that is, such of them as he had any control of. They were packed and locked up in trunks which were kept in T. C. Durant's office. The various counsel employed in the New York suit took many of them which were never returned. Those of course I did not have. I did not decline to produce the books before special examiner Meagher, for inspection, when my deposition was then taken, upon request of Mr. Rogers' attorney, but told his attorney that I would get authority from the receiver to produce them; that if he told me to show them, I would get them and aid him all I could. But Mr. Whitney left here so suddenly that I had no time to get them for him. All the books in the receiver's custody were in that office, as I have said. Mr. Rogers' lawyer asked me for them, and I told him that, personally, I had no objections to his having the books, but I must get permission from my superior in the matter, and he said all right, and asked me to attend to it that day. I did so try to see the receiver, and also the next day, but failed to do so. Mr. Whitney also tried to see him,
but failed the same as I did. When I did see the receiver, Mr.
128 Whitney had left for home. Such books were then, and still are, in the custody of the receiver.

M. B. Sprague was the only one authorized to manage the affairs of Davis, Sprague & Co., so far as giving out ties was concerned. Mattox and myself had full authority in the financial matters for the same concern.

James W. Davis was the manager and everything else for James W. Davis & Associates, and was not the principal manager for the tie contractors from first to last.

What I have stated about the Lowry & Upton matter is not from hearsay.

I did not hear T. C. Durant give his deposition in this case, nor have I read it over. I have been engaged in three kinds of business in the last seven years.

The defendant Durant then offered in evidence certain portions of the record in a suit brought by Henry J. Rogers, the complainant, against William F. Durant, James W. Davis, M. B. Sprague, William Ruth, T. P. Richards, James H. Gessner, and Pierson S. Mattox, as partners, by the name and style of Davis, Sprague & Co., in the circuit court of Cook County, on the 18th day of April, 1872.

Said suit was brought to recover the amount which he had been compelled to pay as surety on an appeal bond, dated October 19th, 1869, in a suit brought by J. W. Collins against Davis, Sprague & Co. in the district court of the second judicial district of Wyoming, on the 12th day of July, 1869.

In the course of said trial in said circuit court of Cook County, said Rogers testified as follows, on the 15th day of April, 1872:

My name is Henry J. Rogers. I live in Cheyenne.

I knew some of the members of Davis, Sprague & Co. Davis, Sprague, Durant, and Ruth were the only ones I had any personal acquaintance with.

Q. "Do you know Mr. Mattox?
A. "Yes, I knew Mattox.
Q. "Do you know Mr. Gessner?
A. "Yes, I knew Gessner."

They were engaged in furnishing ties and timber for the construction of the Union Pacific railroad. They also had a store.

129 I think Collins had a subcontract under Davis, Sprague & Co. There was litigation between them and Collins, in reference to some claims.

Davis, Sprague & Co., in the course of that litigation, requested me to become surety on an appeal. I became surety for Davis, Sprague & Co. at the instance of James W. Davis, who wrote me a letter, and M. B. Sprague, who made a personal application.

I paid the money for Davis, Sprague & Co., at their request, about a year ago.

After seeing them in New York I went home and paid the judgment, and have never received a cent for it to this day. Neither have I got a cent for the $25,000 more that is laying in New York yet.

Q. (By attorney for Durant.) "That is, Davis & Associates.
A. "It is all the same firm.
Q. "How did you find out it was the same firm?
A. "From members of the firm.
Q. "Did you ever find it out from Mr. Durant?
A. "I don't know that I have.
Q. "Hasn't he always told you that he never was a member of the firm of Davis & Associates?"

No answer.

Q. "Now, I want to know if Mr. Durant has not always told you he never was a member of the firm of Davis & Associates?

(Objected to by attorney for Rogers.)

A. "Yes; but at the same time I never have believed it. He has always told me that fact. He has told me he was a member of the firm of Davis, Sprague & Co., but not of Davis & Associates. That is the idea."

I left my bills in New York with the referee.

I put this claim on the bond in there, but they wouldn't receive it. It was thrown out because there was nothing except the certificates of the clerk.

The upshot of the matter is that I paid the judgment against myself, at the request of Davis, Sprague & Co.

The name Davis, Sprague & Co. does not appear in my transactions with them more than half a dozen times, and they did business from early in 1868 till they closed up, and drew checks, gave paper, and held

130 themselves out as Davis and Associates, though I have seen paper signed Davis, Sprague & Co.

The first transaction that I ever had with them was in the name of Davis, Sprague & Co. It was either late in the fall of 1867 or early in 1868. It was as a banker. I received their notes for $20,000, and they were signed Davis, Sprague & Co. Notes for cattle sold to them. They were then starting in on their contract—the million-tie contract.

I collected those very notes that were given me from Mr. Mattox, the

cashier and bookkeeper, and he gave me a check on their banker signed "Davis and Associates, by Mattox, cashier."

The defendant, Durant, also offered in evidence the testimony of Henry J. Rogers, given on the 15th of May, 1876, in the circuit court of Cook County, Illinois, before Judge Rogers, and a jury, in the case of H. J. Rogers vs. W. F. Durant and others, being the second trial of the suit brought by Rogers for the recovery of the amount alleged to have been paid by him as surety on an appeal bond, in a suit brought by J. W. Collins against Davis, Sprague & Co.

Examination by Mr. WHITNEY, attorney for plaintiff:

Q. "You are the plaintiff, are you?

A. "Yes, sir.

Q. "You may state in what business, and where you were residing in 1869.

A. "I resided in Cheyenne, in the Territory of Wyoming; engaged in the business of banking.

Q. "Did you know of the firm of Davis, Sprague & Co. at that time?

A. "Knew of such a firm; yes, sir.

Q. "Who composed that firm?

A. "James W. Davis, Mordecai B. Sprague, P. S. Mattox, W. F. Durant, James H. Gessner, William Ruth. I have forgotten the other parties named. Timothy P. Richards and some person else that I don't recall.

Q. "State if you had any business transaction with that organization or firm.

A. "I had.

Q. "State how, when, and how long these transactions extended, about?

131 A. "I commenced business with them in 1868—possibly in 1867. I don't remember now, and continued until 1870.

Q. "What did their business consist of?

A. "They were furnishing ties, timber, and lumber to the Union Pacific Railroad.

Q. "They were furnishing during the time you have mentioned—during the whole time—from 1867 to 1870?

A. "Yes, sir; I expect so. I can't tell you exactly about that—how long they were furnishing.

Q. "You may state who managed the business principally for this firm out there.

A. "James W. Davis and Mr. Sprague were the managing partners.

Q. "What other partners, if any, were out there at all during the operations of that firm there?

A. "Mr. Mattox was there, Gessner was there, and Mr. Durant was there part of the time, at one time; I don't know how long he was there; he was there at one time.

Q. "What was he out there for—what was he doing out there?

A. "I can hardly tell you.

Q. "Was it anything connected with the business of this firm?

A. "I don't know of my own knowledge what he was doing there, except that he was with his other partners there in the office.

Q. "In the office of the concern—of the firm?

A. "Yes; I think Mr. Durant had something to do with a lumber yard at one time.

Q. "Where was it?

A. "At Laramie City, I think, the lumber yard was.

Q. "That was on the line of the road, was it?

A. "Yes, sir.

Q. "State whether he did not attend to the disposal of lumber while he was there.

A. "Not for a very great length of time he didn't. He did have something to do with a lumber yard for a time; how long I don't know.

Q. "State if you did the banking business of this firm.

A. "Part of it.

132 Q. "State, Mr. Rogers, if you paid any money for the firm at the request of any member of the firm—the firm of Davis, Sprague & Co.?

A. "I did.

Q. "How much did you pay, and when did you pay it?

A. "I paid twenty-five hundred and odd dollars in 1872. The exact date I can't state.

Q. "By whose request did you become liable to pay it, and paid it?

A. "James W. Davis and Mordecai B. Sprague, of the firm of Davis, Sprague & Co., as they called themselves.

Q. "Were you requested to sign any obligation for this firm of Davis, Sprague & Co.?

A. "I was.

Q. "Were you asked to sign any paper out there in a legal proceeding?

A. "I was.

Q. "Who asked you to do it?

A. "Mr. Davis and Mr. Sprague.

Q. "You may state when that was, as nearly as you know?

A. "Well, I think that was in the year 1869.

Q. "State to the court and jury what was stated on that occasion?

A. "Mr. Davis represented to me that the judgment had gone against him for some $2,000, and that their property was in jeopardy, and would be sacrificed.

Q. "Whose property?

A. "The ties of this concern, Davis, Sprague & Co.

Q. "Have you now stated all the conversation at that first time you remember?

A. "Yes; about the purport of it, that their property was in jeopardy, and I think he told me some $30,000 worth of property.

Q. "Whose property?

A. "Davis, Sprague & Co's.

Q. "You may state, Mr. Rogers, whether or not you have paid any money on account of that bond, and if so, when and how much, in this same connection?

A. "I paid a judgment against me on that bond in 1872.

133 Q. "For how much?

A. "Twenty-five hundred and odd dollars; $2,586, I think."

This judgment referred to is the judgment of Collins vs. Davis, Sprague & Co.

The witness testified at length that he was in New York at the time of the trial of the New York case, and there had some conversation with defendant Durant, about the payment of his claim against Davis, Sprague & Co., by reason of the suretyship aforesaid.

Defendant also offered the record of certain proceedings of one R. S. Grant, to be made a party to the New York suit heretofore referred to.

On the 12th day of April, 1875, R. Suydam Grant filed an affidavit in said cause of W. F. Durant et al. vs. Timothy P. Richards et al., to the effect that said Grant was the owner of a certain claim relating to the million-tie contract.

That no part of it had been paid, and that the same should be proved before said referee Redfield to share pro rata in the funds in the hands of said receiver.

That said affiant had never been notified in said cause to prove said claim, or was aware of any proceeding therein until very recently, within a few weeks before filing said affidavit. He therefore prayed an order for a stay of proceedings in said cause, and that there be no distribution until his claim should be proved before the referee.

This stay of proceedings was temporarily granted by Judge Barrett on the same day the affidavit was filed, and finally the matter came up for hearing upon said affidavit and counter affidavits, and the application was overruled by Judge Barrett, in the following words:

"The only fact stated by the applicant is that he did not learn of the reference until within the last few weeks. This is wholly insufficient to excuse his laches, and it is certainly singular that he should have held this claim since 1870 without making such inquiries as would have led to notice of these proceedings.

"It is only in a very strong and clear case that the court should interfere with the effect of a decree of exclusion, and no such case is here made out.

"Motion denied and stay vacated."

And judgment was entered in the following words:

"At a special term of the supreme court, held at the chambers thereof, in the city hall, in the city of New York, on the 15th day of May, 1875.

134 "Present, Hon. Geo. C Barrett, justice.

"WILLIAM F. DURANT ET AL.
"*vs.*
"TIMOTHY P. RICHARDS, JAMES W. DAVIS ET AL.

"The order to show cause in this action, dated the 12th day of April, 1875, whereby the parties in this action were required to show cause why the claim of R. Suydam Grant, therein mentioned, should not be proved before A. A. Redfield, esq., as referee, having come on to be heard now, on the judgment-roll in this action, and on reading and filing the said order to show cause, and the affidavit of the said R. Suydam Grant, upon which the same was granted, and also the affidavits of Benjamin F. Bunker, Alfred G. Lathrop, Harriet V. Lathrop, and R. Suydam Grant.

"After hearing Mr. Charles Harris Phelps, of counsel for the said Grant,

in support of the said order to show cause, and the motion thereby made, and Mr. Clark Bell, of counsel for the plaintiff, Mr. Wm. E. Stiger, of counsel for Henry J. Rogers and Benjamin F. Bunker, distributees under the decree herein, Mr. Grantz Nathan, of counsel for the receiver herein, in opposition to the said motion, and after the deliberation thereon,

"It is ordered that the said motion be, and the same hereby is, in all things denied, and the said order to show cause dismissed.

"And it is further ordered that the stay of proceedings contained in the said order to show cause, be, and the same hereby is, in all things vacated.

"A copy.

"WM. WALSH, *Clk.*"

(Endorsed:) Filed May, 1875.

HENRY C. CRANE, produced as a witness on behalf of the defendant, W. F. Durant, in the city of New York, on the 15th day of March, A. D. 1877, testified as follows:

I am forty-six years of age; reside at Yonkers. In 1867, 1868, and 1869 I was engaged as treasurer of the Adirondack Company, and assistant treasurer of the Credit Mobilier of America. In 1867, assistant treasurer and secretary of the trustees of the Oakes Ames and Davis contracts of the Union Pacific Railroad.

William F. Durant and Timothy P. Richards I have known for twenty years. I have known Rogers three or four years.

I executed the million-tie contract as secretary for the trustees for the contractors for building the U. P. R. R. The contract shows its date itself. Said contract was performed, and the business under it done by Davis and others, in the name of Davis, Sprague & Co.

There was no other written contract to my knowledge, for furnishing the ties by Davis or any associates. There was some arrangement made with Davis by Thomas C. Durant, acting for the trustees.

135 M. B. Sprague, W. F. Durant, James H. Gessner, William Ruth, T. P. Richards, P. S. Mattox, and W. D. Train were interested with Davis in the million-tie contract. I was told by Davis that his associates in the million-tie contract had abandoned him in the work west of said contract, and as they had nothing to show that they were interested in that work, they would have a good time in getting any money he might make out of it. My recollection is that this was in the fall of 1869, in September, in New York City. I know nothing as to who, if any person or persons, were interested with Davis in getting ties beyond the million-tie contract, or in what name.

Cross-examination:

What I have answered on direct examination is of my own personal knowledge. I know of the million-tie contract, because I executed it as secretary of the trustees.

An interest was assigned to me as trustee for W. D. Train. I was in almost daily correspondence with parties engaged in the work, and was in receipt of telegrams and letters from Davis and others, in relation to the carrying out of the contract.

They also drew drafts for money which I paid. I produce three of such drafts.

Said drafts are attached as Exhibits 1, 2, and 3, and are as follows:

EXHIBIT 1.

DAKOTA TERRITORY,
Ft. Saunders, May 14th, 1868.

H. C. CRANE, Esq.,
20 *Nassau st., N. Y.:*

Please pay to the order of B. F. Bunker, cashier, five thousand dollars, and charge same to account of

Yours, &c.,

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

$5,000.]

(Endorsed:)

Pay to the order of Kountze Bros. & Co.

BENJ. F. BUNKER, *Cash.*

Pay to the order of H. W. Yates, cash.

KOUNTZE BROS. & CO.,
SHERMAN.

Pay to the order of Central Nat. B'k, N. Y., for collection for account of the First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

Paid at the Central Nat'l Bank.

136 EXHIBIT 2.

$6,000.] OMAHA, *March 25th,* 1868.

At one day's sight please pay to theorder of Messrs. Davis, Sprague & Co., six thousand dollars, and charge to account of

Yours, &c.,

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

To H. C. CRANE, Esq., 20 *Nassau st., New York.:*

[Three doll. stamp.]

(Endorsed:)

DAVIS, SPRAGUE & CO.,
By JAMES W. DAVIS.

Pay to the order of Nat. Park Bank, of N. York, for collection for account of the First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

EXHIBIT 3.

$6,000.] OMAHA, *June* 19, 1868.

At sight, pay to the order of First National Bank six thousand ($\frac{\$}{100}$) dollars, value received, and charge to account of

DAVIS, SPRAGUE & CO.,
By J. W. DAVIS.

To H. C. CRANE, Esq., 20 *Nassau st., N. Y.*

No. .]

[Two cent D., S. & Co., 6 22 '68 stamp.]

(Endorsed:)

Pay to the order of Central Nat. B'k, N. Y., for collection for account of the First Nat'l Bank of Omaha.

H. W. YATES, *Cash.*

Paid at the Central Nat'l Bank.

I was out on the line of the railroad but once, and then as far as Laramie, during the continuance of this tie contract. I remained there but a few days.

I don't know of any other contract made for ties than the million-tie contract.

I do not know that all vouchers for money paid by the Union Pacific Railroad for ties were signed "J. W. Davis & Associates." I know the name in which the business of the million-tie contract was carried on, from the signatures on drafts paid by me, and the correspondence in regard to the contract, and general course of the business.

137 I don't know of any contract beyond the million-tie contract, but there was an arrangement as I have explained. I heard no conversation in relation to it, but was told by both Davis and T. C. Durant, of its having been made.

I know who the parties interested in the million-tie contract were from seeing assignments of interest in said contract and from Davis personally.

I know who were interested in furnishing ties, beyond the million-tie contract, from my position of secretary of the trustees and from Davis. There was no board of trustees of the Union Pacific Railroad in 1867, 1868, and 1869. The trustees for whom I acted were trustees for carrying out the contracts for building the Union Pacific Road, and were Thomas C. Durant, Oliver Ames, Sidney Dillon, H. S. McComb, Benjamin E. Bates, C. S. Bushnell, John Duff. Mr. John B. Alley was a trustee for a short time, but resigned, and his place was filled by Mr. John Duff.

The board of trustees never made any contract for ties, except the million-tie contract. James W. Davis and his associates, under the million-tie contract, did furnish ties at once after its execution and until the contract was completed.

After the completion of the contract, ties were furnished, as I understood it, under an arrangement made with James W. Davis, by T. C. Durant. All I know about a change of management was what Davis told me, and as explained before.

As to other accounts, I know nothing about them, only as to how they made enteries of their money transactions.

THOMAS C. BRUSH, a witness produced on behalf of the defendant William F. Durant, in the city of New York, on the 29th day of March, A. D. 1877, testified as follows:

I am thirty-one years of age; clerk by occupation, and reside in Brooklyn. I have known Rogers since early in the year 1869.

I received a check dated Cheyenne, May 17th, 1869, drawn by James W. Davis & Associates on Rogers & Co., to my order for the sum of $99.35. The check was not paid.

I never sold the check to Rogers & Co. or H. J. Rogers, and consequently received no consideration therefor.

138 I never received any amount of money on account of said check from Rogers & Co. or H. J. Rogers.

I sold the check to George Hunt, then a telegraph operator at Tie Siding, and delivered the same with the proviso if it was not honored I should refund the money and take back the check. Upon the return of the check I refunded the money received of said Hunt, and the check came again into my possession,

In returning the check he informed me that the express by whom he sent it to Rogers & Co. for collection, gave as a reason for the check being unpaid that Rogers & Co. had doubts as to the genuineness of my endorsement, and consequently refused to pay it. I then informed Messrs. Rogers & Co. that the endorsement was genuine, and asked them to honor it when again presented.

In a short time I saw Mr. C. Christopher, and through him James W. Davis & Associates, in relation to it. And he agreed to see Messrs. Rogers Co. when he went to Cheyenne and arrange with them so that it would not be dishonored again.

On this assurance, I tendered the check to either M. V. Boughton or Stephen J. Field, in part payment of the bill I was indebted to them for groceries used by me at Green River, Wyoming Territory. It was accepted, conditionally, on its being honored, and I was informed and believe, that on its presentation, Rogers & Co. then said it was not worth a damn, and it was never returned to me nor credited to me in the account of either of these gentlemen above named. I then wrote Messrs. Rogers & Co. that the check was my property, and forbade payment to any other than myself, and asked for its return to me. I also sent a message by said M. V. Boughton to Messrs. Rogers & Co., that I desired the check mailed to me at Omaha, where I spent the winter of 1869 and 1870. Mr. Boughton afterwards informed me that my message was delivered and that Messrs. Rogers & Co., had promised to comply with my request.

I also saw Mr. H. J. Rogers during that winter, and told him that the check was my property, and he informed me that it hadn't been paid, and that he would return it. I have also written him from New York but received no reply, and believe the check still to be in his possession.

Cross-examination:

I have made a claim on H. J. Rogers, and also James W. Davis & Associates, for both the check and its value.

I informed Henry J. Rogers, both personally and by letter,
139 that the check was still my property, and also forbidding payment to any other than myself.

Henry J. Rogers told me that no money had been paid on the check, and that he would pay it to none other than myself, and I will swear that I never received from him any money on that account.

I claim, on his own statement, that he never acquired any ownership therein. I am prepared to swear definitely that Henry J. Rogers never purchased the check from me, and, on his own statement, he never purchased it at all.

The check was tendered by me in part payment for a bill of groceries, conditional upon its being honored; and I was informed that Rogers & Co. said it was not worth a damn, and it was left with them for collection; on which information I stopped the payment of the check, and upon Mr. H. J. Rogers assuring me that he hadn't paid it, and would not, I paid the amount due, and assumed the ownership of the check.

I endorsed and delivered the check to George Hunt, a telegraph operator at Tie Siding. He advanced the money to me provisionally upon its payment. The check was sent for collection and returned, as Hunt informed me, because Rogers & Co. had doubts about my endorsements being genuine. I refunded the money to Hunt and he returned me the check. Afterwards I tendered the check, as I have already stated, and have never seen it since.

I mean to be understood that Messrs. Rogers kept the check after my request, and Rogers' promise to return it to me, which I considered equal to obtaining it by false pretenses.

I never transferred the check to any bank, and had no account, to my knowledge, in any bank that has been wound up.

I didn't press my claim to the check in the New York suit because I didn't have the check in my possession, and I was informed by J. W. Davis that Rogers & Co. also presented a claim, in which said check was included; and, upon this statement, it was stricken out of my account, by consent of Mr. Davis, myself, and Mr. A. A. Redfield, referee, as we didn't want it presented twice, and upon Davis informing me that Rogers agreed to pay me for what he received by it.

I knew of the existence of the order for claimants to present their claims in that suit. I presented my claim, and this check was stricken out as before stated.

I do most decidedly now claim to be the owner of the check.

140 I reconcile this statement with the fact that I endorsed and delivered the check in this way. I could not collect on the check without endorsing it, as it was payable to my order, and Messrs. Rogers & Co., retained the check in their possession after my request to them, and their promise to me, that it should be returned. I endorsed the check as before stated, and do not consider it transferred to any one. Upon its non-payment to Rogers & Co. it came back to me, and I had to take it up. On that second attempt to get it cashed, I had to endorse it, and I have been unable to get it back in my possession, although I have tried many times, as I have already stated.

HENRY W. YATES, produced as a witness on behalf of complainant at Omaha, Nebraska, April 10, 1877, *on behalf of complainant*, testified as follows:

Am cashier of First National Bank of Omaha; have been that, or assistant cashier, for 12 years.

I have the books of Kountze Brothers & Co. for the time they were in business in Cheyenne.

I had only a general acquaintance with the firm of which James W. Davis was a party.

I knew him and was also slightly acquainted with Mr. Sprague, of Davis, Sprague & Co.

James W. Davis and Associates kept a bank account with Kountze Brothers & Co., which account is very long, but I will furnish copy if desired.

It is agreed by counsel for Durant, the book being produced and present before the commissioner, the witness may refer to, and state its contents, without annexing a full copy.

The only account thot I find is that of James W. Davis and Associates. I can only find the last ledger which Kountze Brothers & Co. used, beginning May 1st, 1868. There may have been another account, under a different name, on a former ledger, but I have no knowledge of such account.

I had no personal knowledge of the matter.

The account was commenced June 22, 1868, and was closed when Kountze Brothers & Co. closed their business in Cheyenne May 1, 1869.

I have no personal knowledge of how checks were drawn.

141 This ledger does not show any account in the name of Davis, Sprague & Co. The previous one may have had such an account.

Cross-examination:

I was not actively engaged at Cheyenne, except for a month or two in 1868.

I was a member of the firm of Kountze Brothers & Co., and have been engaged the rest of the time in the First National Bank of Omaha.

I did not get any intimate acquaintance with the business there.

I don't know whether Kountze Brothers & Co. handled the commercial paper of Davis, Sprague & Co. or not; nor whether the First National Bank of Omaha did.

I know the handwriting of Charles D. Sherman. I remember it to be a fact that there was a firm doing business by the name of Davis, Sprague & Co.

I have no knowledge of the New York suit.

Mr. Kountze, president, had charge of all these matters personally.

I don't know B. F. Bunker, but have an impression that a man by that name had some connection with that business.

I had some acquaintance with Christopher, but don't know his handwriting.

The payments on the note for $5,000, at 60 days from April 13, 1868, to the order of John Tiernan, are indorsed in the handwriting of Charles D. Sherman; I think the note is signed by Davis.

This ledger shows, on page 550, that Kountze Brothers had an account with John Tiernan, brought over from Ledger A, the first item credited in which is deposit May 25, 1868, $5,281.25.

Note attached as Exhibit A, and is as follows:

EXHIBIT A.

$5,000.] CHEYENNE, *Ap'l* 13, 1868.

Sixty days after date we promise to pay to the order of John Tiernan five thousand dollars, at First Nat. Bank, Omaha.

Value received.

No.

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

Due June 12-15. Coll. stamps.

(Endorsed:) Paid on the within note two thousand dollars, June 25th, 1868; paid on the within note two thousand dollars, July 2d, 1868;
142 paid on the within note one thousand dollars, July 8th, 1868.
JOHN TIERNAN.

Tiernan's note July 12th, 1868, mdse. a'c., 5,000$.

The note for $1,550, dated Omaha, June 15, 1868, signed, Davis, Sprague & Co., by William Ruth, payable to the First National Bank of Omaha, is signed by William Ruth, as is also this other note for $275, of same date, signed, Davis, Sprague & Co., per Ruth.

These notes were discounted by the First National Bank of Omaha.

The notes are attached as Exhibits B and C, and are as follows:

EXHIBIT B.

$1,150.] OMAHA, *Neb.*, *June* 15, 1868.

Forty days after date we jointly and severally promise to pay to the order of First Nat. Bank, Omaha, at the First National Bank of Omaha, Nebraska, fifteen hundred and fifty dollars, with interest at the rate of twelve per cent. per annum from maturity.

Value received.

DAVIS, SPRAGUE & CO.,
By WILLIAM RUTH.
WILLIAM RUTH.

No. 4183, due July 25-28, 1868.

[Fifty cent D., S. & Co. stamp. Twenty-five cent June 15, 1868, stamp. Five-cent D., S. & Co., July 15, 1868, stamp.]

(Endorsed:) 1,550$. Note given 1st Nat. Bank, Omaha, by Wm. Ruth, due July 28th.

EXHIBIT C.

	3. 94
	15
$275.00.	370. 91
	375. 00

OMAHA, NEB., *June* 15, 1868.

Forty days after date we jointly and severally promise to pay to the

order of First Nat. Bank, Omaha, at the First National Bank of Omaha, Nebraska, two hundred & seventy-five dollars, with interest at the rate of twelve per cent. per annum from maturity.

143 Value received.

DAVIS, SPRAGUE & CO.,
Pr. RUTH.

No 4,190, due July 25-28, 1868.

[Five cent stamp. W. R. June. Five cent stamp. 15, 1868. Five cent stamp. D., S. & Co.]

(Endorsed:) 275$. Note given 1st National Bank by Wm. Ruth, due 28th July.

The draft, dated May 19th, 1868, drawn by McDonald and Henry, for $2,243.61, at 60 days, on Davis, Sprague & Co., has my signature, "H. W. Yates, cashier," on the back of it. This signature: "John McCormick & Co." is in John McCormick's handwriting.

I think that whether the checks were drawn in the firm name or the name of some officer of the association they would still be charged on the account which I have shown.

Witness is requested by defendants' counsel to turn to page 68 of the ledger, produced by him, and state for whom the account there shown, in the name of "Benjamin F. Bunker, cashier," was kept.

WITNESS. I judge from this that it is the same account with Davis and Associates, as the account of James W. Davis & Associates, commenced at the date when that account closed.

Q. "What is the date of the last credit item on this Bunker account?"

A. "June 25, 1868."

Q. "For how much?"

A. "$121.22."

The credit column of this account shows a balance for $175.80, brought forward from ledger "A."

I don't think I have the signature book for depositors in my possession.

144 WILLIAM W. CORLETT, being produced as a witness for complainant, at Cheyenne, on the 12th day of April, 1877, upon examination by Daniel McLaughlin, testified as follows:

Am 35 years of age; occupation, lawyer.

I know Rogers, Ruth, Davis, Sprague. I think I have seen Mattox. Don't know any of the other parties to this suit.

I lived here in '67, '8, and '9.

I know that such firms as Davis, Sprague & Co. and Davis & Associates were engaged supplying ties and lumber to the Union Pacific Railroad Company, in the Territory, during some of those years.

The headquarters of those firms was at Fort Saunders, Wyoming Territory, or near there, as far as I know, at that time, Dacotah Territory.

I only recollect having seen M. B. Sprague at that point. I saw him frequently during 1868-69.

He seemed to be the active manager of the firm or firms mentioned, so far as its business in that region was concerned.

The firms whose business Sprague represented were known as Davis, Sprague & Co., or Davis & Associates.

I know the character of their business from having a small amount of business with and a good deal for them, and also from general observation and report.

Q. "State whether an association of persons, known as Davis, Sprague & Co., and the firm or association known as James W. Davis and Associates were two distinct associations of persons, or not."

Witness states, under objection:

I can't say that I know of my own knowledge. I think I was acquainted with the general belief and report, as to whether these names were applied to different firms, or to one association, and I think it was generally believed and reported that they were the same.

During 1868-'9 I was acquainted as far west as Bryan, about 300 miles from Laramie City, on the Union Pacific Road. Fort Saunders is about two miles from Laramie and 54 west of Cheyenne.

Davis, Sprague & Co., or Davis & Associates, furnished ties, lumber, &c., as far west as North Platte River, to my knowledge, or the point known as Fort Steele.

145 Elk Mountain is southeast from Fort Steele, about 20 miles.

I think these firms furnished timber at North Platte, in 1870. Possibly later.

I have, as an attorney, examined papers in suits commenced in Wyoming, in which Davis, Sprague & Co., or James W. Davis & Associates were parties.

Q. "How was this firm doing business at Fort Saunders impleaded?"

(Objected to.)

A. "Sometimes as Davis, Sprague & Co., and sometimes as Davis & Associates."

I am acquainted with James W. Davis.

I remember the bill, of which you now hand me a copy, which was filed in Wyoming in 1870. This is a printed copy with the exception of the written verification.

The witness states, under objection, that the written verification attached to the printed bill is the same in terms as the printed verification, with the exception of the venue and the jurat, and that the printed copy of the bill shows the full purpose of the complainant, Davis, in that suit.

Q. "Can you state from your own knowledge, or the copy of the bill, who were impleaded as associates with Davis?"

(Objected to.)

A. "I can only state what the bill shows."

Counsel for complainant, Rogers, offers a copy of the bill shown witness in evidence, and it is attached to the deposition of Corlett.

(Objected to by counsel for Durant.)

The firm of Davis, Sprague & Co., or James W. Davis & Associates, was almost universally known along the line of the road.

I think that prior to the filing of this bill, Exhibit A, it had been talked of that there was a difference between the firm of Davis, Sprague & Co., and Davis & Associates, though I only remember one occasion at Laramie City, but I forget what the proceedings in court were in which the question arose.

I have read the papers published in the Territory since '67, and have

never seen any notice of the dissolution or expiration of the firm of Davis, Sprague & Co.

I never received any notice that the firm of Davis, Sprague & Co. had dissolved or expired.

146 Christopher was the book-keeper, usually called the cashier of Davis, Sprague & Co. and Davis & Associates at Fort Saunders in the years 1868 and 1869.

I don't know of any change in the firm name or business carried on at Fort Saunders in the fall of 1868, from what it had been carried on in prior to that time.

I was at Laramie City perhaps once a month in 1868.

Q. "In these lawsuits spoken of, in which this association was sued as Davis, Sprague & Co., and Davis & Associates, state whether you know that they represented two distinct firms, or whether the public knew them as one firm."

(Objected to.)

The WITNESS. "The public acted as though it considered them one firm.

Q. "By what name or names did this firm deal with the public?"

(Objected to.)

A. "By the names of Davis, Sprague & Co., and Davis & Associates."

I have no personal knowledge of Durant's being a member of either firm.

Cross-examination:

My business with these parties was in making collections from them, on their paper or open accounts. I don't remember who for in any instance, nor anything about it, except that I went to Fort Saunders.

I obtained my information from which I testified, as to the general knowledge or belief about these firms, from parties having claims against them and from controversies between parties and the firms, and especially about court time, at Laramie, Rawlins, and Cheyenne.

This common report was my evidence of the general belief.

I have heard Mr. Bennett and Mr. M. C. Brown, of Laramie, speak on this point. I can't recall any other names.

The Union Pacific Railroad was completed to Ogden in 1869, I think.

I think Davis, Sprague & Co. and James W. Davis & Associates were sometimes joined as co-partners.

You having refreshed my recollection, I remember the Lowry & Upton case, and I appeared in it for some of the parties, but on looking at these papers, I remember the defendants were Davis, Sprague & Co.,

147 Boyd & Williams, Davis & Associates, A. M. Burnham and William Crout. M. C. Brown was the plaintiff's attorney; the same man I just referred to.

W. R. Steele and I. W. Cook both appeared in the case.

So far as I have heard business men who came in contact with them speak of the matter, the firms of Davis, Sprague & Co. and James W. Davis & Associates were almost universally known.

I don't know when Christopher commenced to be cashier.

I don't know whether cashier and bookkeeper were the same.

Although I had no personal knowledge of any change in the firm or

business of Davis, Sprague & Co., at Fort Saunders, in 1868, I heard there was a change in the name and business of that firm, from Sprague, I think.

In the Lowry & Upton suit there was no judgment against anybody except Davis, Sprague & Co.

I know of the New York suit only by receiving notice as a creditor.

I don't know how Rogers derived his information that Durant was interested in the contract for furnishing ties. I presume he may have obtained it from his knowledge of the suit commenced at this place, shown in Exhibit A, but of course don't know that it was his sole means of information.

I have acted as attorney for Rogers occasionally.

I think I was counsel for Rogers & Co. for about a year.

Don't remember to have advised with Rogers about the New York suit.

I know the signatures of R. S. Van Tassel and James W. Davis.

Witness identifies Exhibit B, and says the acceptance across the face is in the handwriting of Davis.

Also Exhibit C, as being signed by R. S. Van Tassel.

Said exhibits are as follows:

EXHIBIT B.

$795.00.] CHEYENNE, DAKOTA TERRITORY, *May 30th*, 1868.

Mess. DAVIS, SPRAGUE & CO.:

GENTLEMEN: You will please pay to Sebree & Robertson, or order, in thirty days from date, seven hundred and ninety-five dollars, being for repairs on horse wagon. And oblige

Yours, respectfully,

BOYD & WILLIAMS.

[Two-cent stamp. B. W. May 30.]

148 (Endorsed:) Tie acc't. $795.00. Boyd & Williams. Sebree & Robertson's d'ft. Wagon repairs. July, '68.

SEBREE & ROBERTSON.

Pay G. Wilson, cash., or order.

J. A. WARE & CO.
J. A. WARE & CO.,
Per GEO. WILSON, JR., *Cash.*

EXHIBIT C—W. W. CORLETT.

$200.] OCT. 18TH, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, two hundred $\frac{00}{100}$ dollars on acc't M. T. Seymour, ag't.

R. S. VAN TASSEL.

No. 1347.]

I made a draft on James W. Davis & Associates, at Cheyenne, in favor of Rogers & Co., for $250, on or about December 5th, 1869.

When I drew the draft, I supposed it would be paid at once, but being informed that it was accepted, I did not withdraw it from Rogers' bank, but left it to be collected for me. As to proving it up in New York, I think that was done before I had any knowledge that it was to be done, but made no objection to it upon learning of it.

I have realized upon that draft the sum of $15.82, which I received from Rogers, in November, 1875. If any balance is collected, it should be remitted to me.

I know Cornelius Christopher very well. I have seen him within two weeks, here in Cheyenne.

I don't know whether he was here on Rogers' behalf. He said he was going into business, and afterwards he had received a letter from Rogers, saying he wanted to take his testimony. He conferred with me about this suit in the way of asking questions, and asking if I would act as Rogers' attorney.

I never sold the $250 draft to anybody, except as I assented to what had been done with it, as stated.

149 Redirect examination:

This draft was drawn on account for indebtedness for legal services rendered to Davis & Associates and Davis, Sprague & Co.

Davis and M. B. Sprague engaged my services.

The draft was drawn on account.

I had an account allowed in the New York suit also.

T. A. KENT, being produced as a witness for complainant, at Cheyenne, April 12, 1877, testified as follows:

I have resided in Cheyenne since August 5th, 1867. Am a stock raiser. I have also been in the liquor business, at Cheyenne, Benton, Bryan, and Bear River in, '68 and '69.

I knew an association of persons furnishing ties, called Davis, Sprague & Co. or Davis & Associates.

Q. "Were they two distinct firms or one firm known by both names? (Objected to.)

A. "I considered them one firm, because Emery Remis, a relative of Davis, told me they were one firm. Also one Lyman Abbott, who was a partner."

I believe this firm had its office at Fort Saunders, and made ties, and floated them down the Platte River.

I knew nearly everybody along the road, from Cheyenne to Bear River, in '68 and '69.

I was selling goods along there, and knew the public belief in relation to Davis, Sprague & Co. and James W. Davis and Associates.

Witness states, under objection, that the public belief was that Davis, Sprague & Co. and James W. Davis and Associates were one and the same firm, and that he never saw any notice in any of the papers published in Wyoming of the creation of an association known as James W. Davis and Associates.

Think I first heard of those parties in January or February, 1868, as Davis, Sprague & Co. I know Davis wrote a dispatch in my store about that time.

I first heard of James W. Davis and Associates after that at
150 Benton, where Wilson and Morton had one corner of my tent for a bank, and Sprague had a tent opposite, and they deposited money in the bank, and told Morton to take up their paper, but only at a discount.

Some men presented some paper which Morton offered to discount, but they went, having pistols and knives, and made Sprague take it up. There was something said about Davis, Sprague & Co. and Davis and Associates, but the man said he didn't care a d——n, but the paper had to be taken up. I think this was after the road had been extended to Rawlins Springs. I couldn't say when it was exactly.

Witness states, under objection, that he guesses the majority of the public considered Davis, Sprague & Co. and Davis and Associates one and the same firm.

I think Elk Mountain is about fifty miles southeast of Benton.

Percy, or Medicine Bow, is the nearest station to it on the Union Pacific Road.

I knew Rogers, Ruth, Davis, Gessner, and Sprague, and Mattox by sight, and have often seen Durant, though I was not acquainted with him.

James W. Davis acted for and represented Davis, Sprague & Co. and Davis and Associates in '68 and '9.

I never had any business with the others.

I don't know who these time checks at Benton were drawn by, or in whose favor.

Sprague claimed that the money in bank was for one firm, and the work had been done for another.

I know these men drew pistols on Sprague; it was the younger of the two Spragues.

I think Morton is in Detroit.

Witness states, under objection, that he does not think any distinction was made by the public in the way of doing business with Davis, Sprague & Co. or Davis & Associates.

Cross-examination:

Posey S. Wilson was Morton's partner.

I was interested in a piece of property sold Mr. Davis here, in Cheyenne, and also in a man they owed money to. Had no other business with them.

My knowledge of the public belief, as to the identity of the two
151 firms, is derived from hearing Davis mention, on one or two occasions, some of the names of the members of the firm—I think once in Omaha and once in Cheyenne. Once he was talking with me about it, and the two Ruths were present and Lyman Abbott. It was in Bemis & Abbott's store, in Omaha. The other occasion was in my store. I couldn't say who was there. I think my man, George R. Wood.

It was a short time after his brother was killed; I don't remember the year.

I don't know who was present at the conversations with Bemis & Abbott. They were partners with me in Omaha, and had a half interest here also. I think Abbott's wife was present, and that it was in the fall of 1868.

Think I have heard the Casements discuss the firm. I have heard it discussed in their office.

I have also talked with D. K. Allen, either at Butler or Bear River.

Don't remember who was present, nor any other instance.

I don't know whether the affair at Morton's bank was in '68 or '69.

I didn't carry on business in those different places at once, but moved from place to place.

I know Cornelius Christopher, and saw him, perhaps a week ago.

He was footing it to the Black Hills.

Redirect examination:

The witness after talking with Mr. Corlett, and his partner, Mr. Stevens, and Mr. Laughlin, says that Kelly, who was shot at Benton, was killed in 1868.

A. W. HAYGOOD, being produced as a witness on behalf of complainant, at Cheyenne, April 12, 1877, testified as follows:

I am a contractor and stock-raiser, and live in Grant's Cañon.

In 1867, I was freighting on the southern route.

In '68 came to this road, and went up and hauled ties on the Little Laramie River.

Contracted with Davis and Associates, but they failed to park ties according to contract, and I hauled for Bussard.

152 In 1868, I was between Cheyenne and Little Laramie River. I came here in June, 1868.

I knew Rogers; I knew Ruth by sight; Davis very well; also knew M. B. Sprague and Gessner.

I knew Mattox, that was acting as cashier at Fort Saunders.

Q. "You say you did not personally know William F. Durant?

A. "No, sir. I knew of him as a partner of Davis & Associates."

(Answer objected to.)

I never saw Durant, that I know of.

When I knew these parties, they were doing business at Fort Saunders, and along the line of the road, furnishing ties and material for the U. P. R. R. to the company. I first became acquainted with the tie firm in the summer of 1868—July, I think. I saw then only Davis, Sprague and Mattox.

There were a great many people doing business under them as contractors. I was well acquainted with Bussard, Collins and Van Tassel.

The firm in which Davis, Sprague and Mattox were interested had only one place of business at Fort Saunders.

I have heard two names applied to this firm or association. Davis, Sprague & Co., and Davis & Associates.

Witness states, under objection, that he understood both these names applied to the firm, and that that was the general understanding, and that the common report was that it was all the same firm.

The personal knowledge I have, was in reference to a contract I took of Sprague, whom I met on the road in a buggy, and closed a contract with him for hauling ties for Davis, Sprague & Co., as I understood it. This was in the month of July, 1868.

They could not furnish the ties for hauling, and I claimed $500 of

Sprague for damages, and afterwards Davis included this amount in a settlement, giving me the paper of Davis & Associates.

In the fall of 1868, the offices moved from Fort Saunders up west.

I don't know that I remember much else. I have heard persons tell stories as regards their transactions with the two firms, as they were called, but don't remember them very distinctly now.

Cross-examination:

I have heard of parties having claims, or doing business for the two different firms, and the general belief was that the same individuals
153 that were members of Davis, Sprague & Co., were also members of Davis & Associates; that is, that the same batch of men did business in one place as Davis, Sprague & Co., and the same batch of men did business in another place as Davis & Associates.

The general idea, as I understood, was that a person suing Davis Sprague & Co., on a claim against them, would sue the same individuals that you would have sued on suing on same paper against Davis & Associates.

I can't state from whom I got the idea as to the general reputation, nor where the conversations were, nor who was present. I don't know who the parties were that had contracts as Davis, Sprague & Co., or as Davis & Associates, except in regard to myself.

I think Bussard advanced the idea to me that the two firms were the same. Don't know where the conversation was, nor who was present. Bussard was a partner with Hogeboom. Christopher advanced the idea. I think he is here. This was when he was in Weber Cañon, in February, 1869.

I have talked with Christopher two or three times lately about my claim.

I have heard of William F. Durant as a partner by hearsay, and from J. W. Davis, for his having drawn articles for me, and mentioned the name of the firm. Those articles were sent to my attorney in Omaha.

Also knew it from Christopher, in Weber Cañon.

The Collins I refer to is J. W. Collins, who had a suit about some cattle. I think Russell was his opponent.

Redirect examination:

It was at Weber Cañon in 1869 that Christopher gave me the names of the firm, and when Christopher was here, about two months ago, I asked him to write the names down for me again.

The names that he gave me then were Captain James W. Davis, as he was called, Pierson S. Mattox, though I thought it was Pierson F.; he was the cashier, anyway; M. B. Sprague and William Ruth and Durant, and this lady, Wilhelmina Davis Train. I don't know if that is all.

Christopher was book-keeper and business manager at that camp.

154 LUKE MURRIN, being produced as a witness on behalf of complainant, at Cheyenne, April 12, 1877, testified as follows:

I am a merchant, and have lived in Cheyenne since 1867. Also had a branch house at Corinne, Utah. Was acquainted along the line of the Union Pacific Railroad with most everybody doing business.

In 1868 and '9 I knew Major Davis, old man Sprague, and old Durant and young Durant.

Never had any business with them. I handled some of their paper in the way of trade.

The firm name was Davis, Sprague & Co., and Davis & Associates.

Q. "You say they were known by the name of Davis, Sprague & Co., and Davis & Associates?"

(Objected to.)

A. "Yes, sir.

Q. "Were they known as one or two firms?"

(Objected to.)

A. "As one firm, as far as I know. The general opinion was that it was one firm."

The principal office was at Laramie City for awhile; then further west. They were at Fort Saunders awhile.

I never talked with any of the members of the firm.

This association carried on its tie business in this section of country, west of Cheyenne, from 1867 until 1870.

I read the papers, and never saw any notice of the expiration or dissolution of the firm of Davis, Sprague & Co., or saw any public posters or notice to that effect.

I and the public understood that it was all one concern; one outfit, they called it.

The collection that I made was on paper signed Davis, Sprague & Co. It was paid by their cashier, Christopher. He was here some time ago.

That was in the spring of 1869.

I don't know the initials of the Durants. One was a small and the other a tall man. I knew both of them. Not acquainted much.

155 The tall man was vice-president of the road, and the small man was engaged in the lumber business. The small man had his headquarters at Ogden or Salt Lake. Don't know where he lives now.

I met the small man frequently along the line of the road, here and at different places in '68 and '9. He was known as Major Durant along the line of the road, and was the one who was associated with James W. Davis and old man Sprague. He was in the lumber business at Ogden or Salt Lake, I disremember which.

Witness states, under objection, that he never heard any announcement that Davis, Sprague & Co. was different from Davis & Associates, until there was a break-up in 1871.

It was a year or two afterwards that I heard there was two firms, after the break-up.

Cross-examination:

There was a firm doing business along the road that was known as Davis, Sprague & Co., and a concern that went by the name of Davis & Associates, and my belief and the general belief was that the same persons were in both firms, so that if you were bringing suit upon a piece of paper made by Davis, Sprague & Co., you would sue the same parties as if it was made by Davis & Associates.

It was the common rumor that the two firms were composed of the same individuals.

The entire source of my knowledge is from paper which I handled. There was a good deal afloat, sometimes signed Davis & Associates, sometimes Davis, Sprague & Co.

The collection I made was for myself, on a due-bill transferred to me which I had taken after maturity, at a discount.

Redirect examination:

I didn't see the paper of both these firms at or about the same time. The first signature was Davis, Sprague & Co., which I saw early in 1868. I don't know that I ever saw any signed Davis & Associates. That is, I didn't handle any myself. I disremember whether I saw any or not, but there was a good deal of talk about different paper.

AMASA R. CONVERSE, being produced as a witness for complainant, at Cheyenne, April 12, 1877, testified as follows:

I am a speculator. Might put me down as a banker. I am in-
156 terested in everything the country affords. Cheyenne, Laramie County, Wyoming Territory.

Have lived here 10 years. I knew that there was a firm called Davis, Sprague & Co., but did not know the members of it, and never knew who constituted the firm entirely. There was Davis, Sprague & Co., and Davis & Associates.

The first I knew of them was in the spring of 1868.

The only members of the firm I can swear to were Davis & Sprague. I understand that Durant and others connected with the Union Pacific Railroad were members of the firm.

I know Rogers. I knew William Ruth, in '66 and '7, in Omaha. He claimed to be one of the firm, but whether Davis & Associates, or Davis, Sprague & Co., I don't know.

I had a speaking acquaintance with Durant; he was supposed to be one of the firm.

I knew nothing of the parties after 1869.

They had a book-keeper named Christopher, in part of 1868. I don't know what Mattox's connection with them was.

Witness states, under objection:

I have always understood, and have been told, that they were two firms, but that the members of one firm constituted the other.

I have never seen nor handled much of the paper of either Davis, Sprague & Co., or James W. Davis & Associates.

I have never seen any notice of the expiration or dissolution of Davis, Sprague & Co., but have read the papers regularly.

The names, Davis, Sprague & Co., and James W. Davis & Associates, were in use at the same time.

The parties supposed to be interested were M. B. Sprague, Ruth, Gessner, Davis, and W. F. Durant. Those were the only names that I knew anything about.

Witness states, under objection, that it was the general reputation among business men of the Territory, in '68 and '9, that Davis, Sprague & Co. and James W. Davis & Associates were one and the same firm.

I don't know that I remember Durant, personally.

I don't remember whether I saw William F. Durant here in 1868 and '9 or not.

157 Cross-examination:

Don't remember whether I ever sold goods to Davis, Sprague & Co. directly or not.

As to the general reputation, my testimony was this:

That there were two firms, one Davis, Sprague & Co., and the other James W. Davis and Associates, both furnishing ties to the Union Pacific Railroad. That the common report and understanding was that the same individuals composed the two firms. That the individuals who were members of Davis, Sprague & Co. were also members of Davis and Associates. That is, that the personnel of the two firms was identical.

In 1871 I went into banking business, and had some of the paper of these parties offered to me, one way and another. Some by Van Tassel.

I often asked the question what the difference was as between Davis, Sprague & Co., and Davis and Associates, but never found anybody that could tell me. Van Tassel told me, substantially, that there were two firms, but composed of the same members, and Charles Sherman told me substantially the same thing, that although there were two different firms by these names, they were, in reality, made up, in each instance, of the same individuals.

Rogers was cashier of our bank when it opened and a stockholder.

The bank was a sort of successor to Rogers & Co.

Christopher spoke to me once about Mr. Rogers' claim. It was a general conversation.

Davis was the only one of the parties with whom I talked as to who composed either or both the firms, and this was in New York, four or five years ago.

THOMAS J. STREET, being produced as a witness on behalf of complainant, at Cheyenne, April 12, 1877, testified as follows:

I am an attorney, and have lived in Cheyenne since 1867.

I knew the firm of Davis, Sprague & Co. first, in November, 1867, and was afterwards engaged during three or four years in numerous suits against them and Davis and Associates.

The partners whom I then knew were Davis, Sprague, Gessner, and Mattox.

In the course of the litigation the names of Dr. Durant and W.
158 F. Durant, and William Ruth, and several others were mentioned as partners. The headquarters were at Fort Saunders in 1868.

I never knew of any firm called Davis and Associates until in 1869.

That firm was engaged in the same business as Davis, Sprague & Co., and composed, as I understood, of the same individuals. I only know they carried on business at Fort Saunders in the fall of 1869.

I read the papers in '67, '8, and '9. Never saw any notice of dissolution or expiration of Davis, Sprague & Co., or any notice, handbills, posters, &c.

In '67, '8, and '9, I think I knew mostly all the people in Wyoming Territory by sight, and nearly all by name.

It is a pretty hard question to answer to state the general reputation as to the personnel of those two firms. The general reputation was that it was all one concern. It was known generally as Davis, Sprague & Co. during those years. Afterwards it became more generally known and called Davis and Associates.

I brought a number of suits against these firms for my clients. The individuals were ordinarily impleaded as James W. Davis and Associates; sometimes as Davis, Sprague & Co., the names of individuals being stated

the same in each instance, I believe. I don't speak from the papers, however.

The suits were brought mostly on paper, except the Lowry & Upton one, which was for an unlawful conversion of some property. These suits were begun in Albany County, I think.

In that county the public considered these two firms the same, so far as I know. I think there was an effort made in those suits to show that the two firms were made up of different individuals. I think this was at the spring term of court in 1870.

I was employed as an attorney for Davis and Associates.

Cross-examination:

Alexander Street was my uncle, an agent of Wells, Fargo & Co.

So far as my knowledge of that general reputation goes, I meant that there were certain parties furnishing ties under the firm name of Davis, Sprague & Co., and that afterwards certain parties furnished ties and conducted their business in the name of Davis and Associates, and that the general reputation and belief was that the same individuals composed the two firms.

I can't give the names of parties from whom I obtained my
159 knowledge of the general reputation, nor state where the conversations occurred, nor who was present.

I talked with McIntyre, Davis, Ruth, Mattox, and Chesborough.

Witness states that his conversations with all these parties were general, and alluded incidentally to Davis & Company getting out ties.

Redirect examination:

I think that in one of the suits M. B. Sprague testified that the firm of Davis, Sprague & Co., and Davis & Associates, were two distinct firms, and that on cross-examination he stated that he was interested with the firm of Davis, Sprague & Co. only as far as running ties down the North Platte or Medicine Bow, and the balance of it belonged to the other firm. That Davis, Sprague & Co. went, I think, to North Platte, and beyond that it was Davis & Associates.

ISAAC W. FRENCH, being produced as a witness for complainant, at Cheyenne, April 12, 1877, testified as follows:

I am a merchant, and have lived in Cheyenne since 1867.

I know Rogers, Davis, Sprague, Ruth, Mattox, and have met Gessner. I have known Rogers since 1866, and Davis since they came here in 1867. I knew Mattox first in 1868.

I was in the commission and lumber business, and knew Davis, Sprague & Co., who were the contractors on the U. P. R. R., with their headquarters at Laramie City, and afterwards further west. Probably they were at Fort Saunders, two or three miles from Laramie.

My business was with Davis, and Mattox, who was their cashier.

They and Sprague had personal charge of the business.

I don't know who composed the firm.

Davis and Sprague represented the company, and I had heard that Mattox was a partner, though I then thought him cashier. This was in the fall of 1868 that they were there.

Neither Davis, Sprague, nor Mattox informed me as to the membership of the firm.

Witness states, under objection, as follows, in reply to questions:

The company at Fort Saunders, known as Davis, Sprague & Co., had another name, which was Davis and Associates. I always knew
160 them as one and the same concern, as did the public, who considered them one concern, and I did in my business. I sold them some lumber.

Davis & Associates seemed to be the commercial name that was given to the public, and Davis, Sprague & Co. were regarded among their employees and other persons doing business with them——

I had some acquaintance along the road; was in business in Cheyenne, and connected with the coal company.

I can now recall but one instance of the commercial paper of Davis, Sprague & Co., or Davis & Associates, which I have seen, which I think was signed by Mr. Mattox. I can't say on behalf of which firm. It was given in payment of a balance due me, by Davis' order, in September, 1868. I sold the lumber to the name of Davis, Sprague & Co., and when I received the check on Kountze Brothers & Co., at Cheyenne, it was signed by another name. I noticed that, but whether it was Davis & Associates, or Davis, Sprague & Associates, or James W. Davis & Co., I am unable to state. I know the signature was different from the invoice to them. I presented it to them for payment at Cheyenne, and had to wait ten days for the money.

The two names are all mixed up together in my memory. I heard them simultaneously.

I never shipped any goods to them, but did to the Wyoming Coal Company, on an order given me by Davis.

The concern represented by Davis & Sprague, of which Mattox was cashier, was known by both names in 1868–'9.

I have never seen any notice of the expiration or dissolution of that firm, nor did I ever know of any change in its membership.

I never heard of Durant; I don't know that he was here.

Cross-examination:

I am positive I became acquainted with Mattox in September, 1868, at the time of this lumber transaction.

What I meant about the identity of the firm, was this: That there was a firm of Davis, Sprague & Co., composed of certain individuals, some of whom were known to the public, and likewise a firm by the name of Davis & Associates, also composed of individuals some of whom were known to the public as interested, and some of whom were unknown, but that the members of the one firm were identical with those of the other.

I gathered my knowledge as to general reputation in conversation with Davis, Dr. C. A. Henry, who was doing business with Davis,
161 Sprague & Co., and Davis & Associates. He was a partner in the firm of McDonald & Henry, and also John H. Young & Co.

I don't remember anybody else that I talked with, it has been so long since.

Witness identifies Exhibit A, as the receipt executed by him at the time he received the check spoken of, which is as follows:

EXHIBIT A.

$3,091.20.] SEPT 25TH, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, three thousand, ninety-one $\frac{20}{100}$ dollars to close acc't of lumber.

C. R. 193. No. 1122.] I. W. FRENCH.

I have had some conversations with Christopher, and he with me about this suit lately.

Rogers is an acquaintance of mine.

I have acted here in procuring witnesses for all of you, I suppose.

I know C. B. Sprague, the younger brother of M. B. Sprague.

JONATHAN E. WILD, being produced as a witness for complainant, at Cheyenne, April 12, 1877, testified as follows:

I am 41 years of age; cashier of the First National Bank of Cheyenne. Lived here since July, 1867.

In '68 and '9, was clerk in the banking house of Rogers & Co.

I knew James W. Davis & Associates. I knew him. They carried on operations west of here. I couldn't specify any particular point. I think Fort Saunders was one of the headquarters; also Piedmont.

I don't know who gave their personal attention to the business, except Davis. I did not know Sprague; have seen Mattox, who was clerk and cashier, so far as I know.

Davis was a member of the firm, Mattox, I think, Dr. Durant, and another Durant, and, I think, Sprague. I can't remember that James W. Davis & Associates were known by any other name during these years.

Rogers & Co. were banking at Cheyenne, and also H. J. Rogers at Laramie.

Davis & Associates kept a banking account with Rogers & Co.

162 We handled a good deal of their paper, but it is so long ago I can't remember, without I should go and find the old books.

They opened the account some time in '68, I think. They were doing an account with Kountze, and some little with Rogers.

I think their paper was signed Davis & Associates, by James W. Davis.

Their paper was in everybody's hands, and came to Rogers & Co. through their customers generally. I don't remember any paper signed Davis, Sprague & Co. coming through accounts to the house of Rogers & Co. There might have been. Our business extended up to the end of the road. I don't know how far up this paper was issued. I don't know where it was dated generally—a great deal of it at Fort Saunders and Piedmont, I think. I think some of it was signed by Christopher. I think there has been some signed by Mattox.

Rogers & Co. continued to receive this paper, in the course of business, down to the spring of 1870.

I knew of the firm of Davis, Sprague & Co.

Witness states, under objection, that the general reputation was that the firm of Davis, Sprague & Co., and James W. Davis & Associates, was the same, and that the public looked on them as one and the same firm, connected together, and that he never saw any announcement in the public

newspapers, or otherwise, of the dissolution or expiration of the firm of Davis, Sprague & Co.

Cross-examination:

I became connected with Mr. Rogers in Cheyenne, in December, 1867. I think he started in August or July.

I had been in business with him before in St. Louis, where he was clerking for me, and I was clerking in a railroad office. I staid with him till 1871.

I don't remember the two notes for about $20,000, made by Davis, Sprague & Co., in the fall of 1867, which Rogers had for collection.

Robert Morrison was the cashier. I don't know when I first saw Mattox' name in a business way.

My duties with Rogers were sometimes writing in the books, counting money, writing letters, sweeping out, blacking stoves, making beds, &c.

What I mean by the general reputation of Davis, Sprague & Co., & Davis & Associates, is that there were some parties doing business here by the name of Davis, Sprague & Co., and also some parties doing business along the road by the name of Davis & Associates, and that the
163 general belief was, amongst the public, that the two firms were composed of identically the same individuals.

Rogers was dealing in the paper of Davis, Sprague & Co., in the summer of 1868.

When I say Rogers received this paper of Davis & Associates, in 1870, I don't mean that he took it at par, less the usual bank discount, but that he discounted it heavy, whatever he did buy of it.

I don't remember the New York suit; never paid any attention to it.

I never advised with Rogers in regard to it, or assisted him in any way about it.

I only know that Rogers proved up claims in that case by hearsay.

My judgment would be his claim there was based on paper that he held. I don't know what paper, or where it was made, or from whom he got it.

I don't know whether I have the custody of Rogers' books here or not. There is no other Mr. Wild here, but they have been put in old boxes, and stored away. I suppose he says I have them, but I haven't seen them since he saw them last. I suppose you could get at most of them.

I know Christopher, and know his signature.

I know Dr. Henry, and his signature. Think I should know Gessner's. I don't forget signatures very easy that I have once seen. I also know Davis'.

I think I remember a draft drawn by C. A. Henry on Davis & Associates to the order of Charles McDonald, dated April 12th, 1869, for $945.99.

We had a good deal of dealings with Dr. Henry, and bought a good deal of paper.

(The witness is shown several pieces of paper.)

By studying these pieces of paper I remember them. I remember a draft drawn by R. S. Van Tassel, on Davis & Associates, to his own order, dated Omaha, November 10th, 1869, for $2,188.54, and believe

Rogers made a trade with him for it. He traded my horse for it, amongst the trade.

He bought it out and out, clean.

I have a recollection of a draft drawn by Davis & Associates on
164 Rogers & Co., to the order of J. H. Young & Co., dated Cheyenne, May 24, 1869, for $22,738.39, at 60 days.

I don't remember whether or not $12,738.39 was paid on that draft; nor could I say whether Rogers bought it, or held it as collateral at any time.

Witness is shown draft drawn by McDonald & Henry on Davis, Sprague & Co., for $1,000, dated Cheyenne, May 29, 1868, to the order of the makers, indorsed by them, and identifies the signature as Dr. Henry's.

I know the draft; I have seen it in Rogers' bank.

Witness also identifies a draft similar to the one above, except the amount, which is $2,243.61, and date, which is May 19th, 1868, and states the signature to be Dr. Henry's.

WITNESS. I don't remember so particularly about that draft. I know "McDonald and Henry" on the back of it, and that one there (indicating) is Mr. Yates. The words "Payable at Rogers & Co.'s banking house at Cheyenne" was made by a clerk in Kountze Brothers & Co.'s.

The check you show me, dated July 26 or 29, 1869, drawn on Rogers & Co., signed C. Christopher, for Davis, trustee, for $38,880.75, is in Christopher's handwriting, and bears the cancellation marks of payment.

The same is offered in evidence, and marked Exhibit A.

Witness identifies Exhibit B, and states the signature of the note to be in James W. Davis' handwriting, and the words across the face, "Received payment, Rogers & Co., July 16th," to be in Robert Morrison's handwriting.

Also identifies Exhibit C, and states that the words "Received payment, C. D. Sherman," are in the handwriting of C. D. Sherman.

Also identifies Exhibits D and E, and states that the signature, "James W. Davis" on each, is in the handwriting of James W. Davis.

Also identifies Exhibits F, G, H, and I, the signature to the first of which is in the handwriting of Christopher. The second, Exhibit G, a receipt for $7,500, dated October 30, 1868, signed "Rogers & Co.," and Exhibits H and I, being two receipts, dated October 27, 1868, one for $700, and the other for $1,512.17, both signed "H. J. Rogers & Co.," and states that the signatures to said last three are in the handwriting of Rogers.

Said Exhibits A to I, both inclusive, are as follows:

165 EXHIBIT A.

No. .] CHEYENNE, WYOMING, *July* 26, 1869.

ROGERS & COMPANY:

Pay to Rogers and Co., or order, thirty-eight thousand eight hundred eighty $\frac{75}{100}$ dollars.

$38,880.75. C. CHRISTOPHER,
For Davis, Trustee.

[Two-cent stamp.]

EXHIBIT B.

$7,188.33.] CHEYENNE, *April* 15*th*, 1868.

Ninety days after date we promise to pay to the order of Robert J. Reed & Co. seven thousand one hundred eighty-eight $\frac{33}{100}$ dollars, at Rogers & Co. Bank, Cheyenne, D. T., value received.

DAVIS, SPRAGUE & CO.,
By JAMES W. DAVIS.

[Five-cent stamp.]

(Endorsed across face:)

[Five-cent stamp.]

Rec' payment.

ROGERS & CO.

JULY 16, '68.

(Endorsed on back:)
Paid on the within am't, $922.00.

ROBT. J. REED.

(Paper attached to same is as follows:)

LARAMIE CITY, *June* 20*th*, 1868.

Messrs. ROGERS & Co., *Cheyenne, D. T.:*

GENT.: Please let Mr. A. Street have that note on Davis, Sprague & Co., due 15th July, and oblige,

ROBT. J. REED & CO.,
Per A. S. REED.

(Endorsed:) $7,188.33. R. J. Reed & Co. Note. Ox train.

166 EXHIBIT C.

$2,908.09.] LARAMIE, *July* 16, 1868.

At sight pay to the order of A. Street, ag't, twenty-nine hundred and eight and $\frac{09}{100}$ dollars, value received, and charge to account of

SMITH & DUDROW,

To Messrs. DAVIS, SPRAGUE & Co.,
Fort Saunders, D. T.

No. .] [$2,908.09.

(Endorsed:) Smith & Dudrow, acc't Ringo & Bussard. Draft Smith & Dudrow, July 16th, 1868. Tie acc't.

Pay to the order of C. D. Sherman.

A. STREET, *Ag't.*,
Per SMITH.

Rec'd payment.

C. D. SHERMAN.

EXHIBIT D.

$100.] SEPT. 9TH, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, one hundred $\frac{00}{100}$ dollars. Acc't Pacific Lime Co.

No. 977.] JAMES W. DAVIS.

EXHIBIT E.

$20.] OCT. 10, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, twenty $\frac{}{100}$ dollars on acc't expense to Green River.

No. 1294.] JAMES W. DAVIS.

EXHIBIT F.

$20.] OCT. 18, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, twenty $\frac{}{100}$ dollars on acc't.

No. 1345.] C. CHRISTOPHER.

167 EXHIBIT G.

$7,500.] OCT. 30, 1868.

Received of Davis, Sprague & Co., for building Union Pacific Railroad, seventy-five hundred $\frac{}{100}$ dollars on acc't. M. T. Seymour, ag't. John H. Young & Co. d'ft. C'k 227, endorsed by Capt. Davis.

No. 1461.] ROGERS & CO.

EXHIBIT H.

$1,512.17.] OCT. 27, 1868.

Received of Davis, Sprague & Co. for building Union Pacific Railroad, fifteen hundred twelve $\frac{17}{100}$ dollars on acc't. M. T. Seymour, ag't. E. W. W. d'ft, Oct. 12, favor Kellogg, for grain. C'k 269, favor H. J. Rogers & Co.

No. 1438.] H. J. ROGERS & CO.

EXHIBIT I.

$700.] OCT. 27, 1868.

Received of Davis, Sprague & Co. for building Union Pacific Railroad, seven hundred $\frac{}{100}$ dollars, on acc't M. T. Seymour, agt. E. W. W. D'ft, Sept. 27, c'k 270.

No. 1439.] H. J. ROGERS & CO.

The witness is shown an affidavit, and states that it refreshes his recollection in regard to the draft for twenty-two and odd thousand dollars in favor of J. H. Young & Co., previously spoken of, and on being asked whether he is able to swear whether or not Rogers held that draft as collateral, and for what amount, states as follows:

Well, I will swear to this over again. As far as my recollection now goes, I recognize the signature to the affidavit, which is my own. Most probably this affidavit was made to be forwarded to New York for Rogers' use in proving up his claim in the New York suit. I will swear to making that acknowledgment, and I will swear that that is my signature.

I had personal knowledge of the correctness of that affidavit, but don't recollect about being informed for what it was to be used, though I suppose I was. I know what I swore to there was correct.

Witness identifies the signature to another affidavit shown him as being that of complainant, and the two affidavits were offered in evidence as Exhibit J.

168 The second affidavit shown witness is the same, printed in full, as an exhibit to deposition of B. F. Bunker. The first is that of witness himself, and is as follows:

EXHIBIT J.

"TERRITORY OF WYOMING,
"*County of Laramie, ss:*

"I, Jonathan E. Wild, of Cheyenne City, in said county, of lawful age, being first duly sworn, on my oath, do depose and say, that I was the cashier in and bookkeeper for the firm of Rogers and Company (which firm was doing a banking business in said city), continuously for the period of about three years last past, and prior to the 18th day of March, 1871, and that I know that C. A. Henry and John H. Young, the parties who formerly comprised the firm of John H. Young & Co., are indebted to said firm of Rogers & Co. upon an account for moneys by said Rogers & Co. loaned to said C. A. Henry and John H. Young at their request, and during the period aforesaid, in the sum of $5,376; that the said sum of money is long since due from said Henry and Young to said firm of Rogers & Co., and that no part thereof has been paid.

"JONA. E. WILD.

"Subscribed and sworn to before me this 12th day of May, 1871.
[SEAL.] "J. W. HUTCHINSON,
"*Clerk District Court.*"

The matter on the stubs of this blank book of drafts, which has been partly used, is in Christopher's handwriting, and having inspected the stubs, I think they correspond, to a greater or less extent, with drafts which were drawn on Rogers & Co. by Davis & Associates.

The handwriting upon the stubs of this blank check book, the checks remaining in which have the name "Rogers & Co., bankers," printed on them, and the localities, Cheyenne and Wyoming, is in Christopher's handwriting, and if my recollection serves me, I remember that checks corresponding with those stubs, to a greater or less extent, were drawn by James W. Davis & Associates on Rogers & Co., and paid.

The said books are offered in evidence, and marked Exhibits K and L.

I saw Christopher a week ago Sunday.

Rogers has not corresponded with me about the case to amount to anything.

169 This letter you show me, addressed to Major J. W. Davis, dated Cheyenne, February 23d, 1877, is in Christopher's handwriting. The letter is as follows:

EXHIBIT M—J. E. WILD.

"CHEYENNE, WY. TERRITORY, *Feb'y* 23, '77.

"Maj. J. W. DAVIS:

"DEAR FRIEND: I am, for the present, here, and have again received earnest solicitations from Harry Rogers (whom I think is pretty hard pressed), in regard to further evidence in his case against Durant. Is it not possible for you to place into my hands that original D. & A. contract, to be used only in his case. I know I can make for you more out of it than the Converse claim. I tried to do all I could in that matter, but failed, Harry being unable to secure Converse. If you will let me have it, I will pledge you my honor and everything not to use it in any other way, and immediately after using it, I will return it personally. Please let me hear from you at once, and anything that I can do for you or yours shall be cheerfully done.

"My wife joins in sending regards. She says she will take that privilege, because you are a friend of mine.

"Yours, respectfully,

"C. CHRISTOPHER."

The two first drafts shown witness were offered in evidence, as Exhibits N and O, and are as follows:

EXHIBIT N.

$1,000.] CHEYENNE, *May 29th*, 1868.

Sixty days after date, pay to the order of ourselves one thousand dollars, value received, and charge to account of,

Yours, &c.,

McDONALD & HENRY.

To Messrs. DAVIS, SPRAGUE & CO.,
Fort Saunders, D. T.

No.

[Fifty cents stamp. McDonald & Henry. June 6, '68.]

(Endorsed:) $1,000.00. Acceptance favor McDonald & H., due July 29th. McDonald & Henry. A. H.

170 S. N. PORTUFULA & CO.:

Pay Kountze Bros. esq., cashier, or order, for collection, First National Bank, Council Bluffs, Iowa.

W. C. H. DEMING.

EXHIBIT O.

$2,243.61.] CHEYENNE, *May 19th*, 1868.

Sixty days after date, pay to the order of ourselves, twenty-two hundred and forty-three $\frac{61}{100}$ dollars, value received, and charge to account of,

Yours, &c.,

McDONALD & HENRY.
C. H. H.

To Messrs. DAVIS, SPRAGUE & CO.,
F't Saunders, D. T.

No. 4240.]

[Ten cents. McD. May 19. Stamp. One dollar. & H. 1868. Stamp.]

(Endorsed:) Payable at Roger & Co's Banking House, Cheyenne, D. T. $2,243.61. D'ft McDonald & Henry. Due July 21st, '68.

Pay to the order of Kountze Bros. & Co., for the account of the First National Bank of Omaha.

H. W. YATES, *Cash.*
C. H. H.

McDONALD & HENRY. JOHN McCORMICK & CO.

Counsel for Durant requested witness to produce the books of Rogers & Co. before the examiner on the following day, at nine o'clock a. m., at the office of W. W. Corlett, where the depositions were being taken.

Complainant objected to the witness producing any books of Rogers & Co., or any other firm or association, because they are irrelevant, incompetent, and not a proper subject to be brought in on cross-examination of this case, and that defendant must make the witness his own.

Counsel for Durant states that as the witness has already been subpœnaed, and is now on the stand, he requests the witness to produce the books, and offers to make the witness his own in regard to the same.

The witness failed to produce the books.

171 DANIEL McLAUGHLIN, counsel for complainant, being sworn on behalf of complainant, testified as follows, in response to written interrogatories furnished the examiner by H. C. Whitney, esq., said examination being had on the 12th day of April, 1877:

I am an attorney, and have lived in Cheyenne since November, 1867. I have known Rogers since 1867; Ruth, since 1859; Davis, since 1875, and by reputation since 1868. I know Gessner. I am not sure about Crane, and am not acquainted with the other parties to the suit.

I lived in Salt Lake City in '67, till October, when I came to Cheyenne.

I knew some firm or association doing business at Fort Saunders, as early as May or June, 1868, commonly called Davis, Sprague & Co., and James W. Davis & Associates, who furnished ties on the U. P. R. R. west of Wyoming and east of the North Platte River, at Fort Steele during the early part of that summer.

I had a ferry on the North Platte south of Fort Steele. I was frequently up there, and the first time went on a tie train, from which ties were delivered that had been furnished by Davis, Sprague & Co. or Davis & Associates. We wagoned it part of the way. I learned of my partner in the ferry business, that ties were being boomed near there, and my recollection is they were commonly reported as belonging to James W. Davis & Associates.

I heard a great deal of complaint against a man named Sprague. "Old Sprague," he was called, and was denominated by the tie men usually as a "d—d old thief;" sometimes a "d—d old son of a b—h," and threats were made against him on account of some dispute about ties, &c. I

heard the name of Davis & Associates used in Brownville and Benton, in 1868, and the name of Davis, Sprague & Co. used, and from the manner in which they were used, I judged then, and inferred, that they were one and the same company.

In the winter of 1868–'9, until June, 1869, I frequently heard members of the bar, amongst others I. W. Cook, R. W. Steele, W. W. Corlett, and T. J. Street, talking about cases, and supposed the firm was known by either name.

I never had any business either for or against James W. Davis & Associates, or Davis, Sprague & Co.

I never seen any announcement of the termination of the firm of Davis, Sprague & Co.

172 I never examined any pleadings in court to see how these parties were sued, but have seen the clerk's dockets frequently in the first and second judicial district courts of Wyoming. I have seen the name of James W. Davis and Associates and the name Davis, Sprague & Co. on the docket in several cases.

At Cheyenne and Laramie, the firm supplying ties at Fort Saunders was known, in the summer of 1868 and also in the months of June and July, 1869, as Davis, Sprague & Co., and Davis & Associates, and as far west as Bryan, in 1869.

I never heard of any change in the firm name, nor saw any notice of change in the organization or name of the firm.

I never knew William F. Durant's connection or alleged connection with Davis, Sprague & Co., or Davis & Associates, except through this case. I had heard frequently of a Dr. Durant in 1868 or '9, whose initials were T. C.

Cross-examination:

Never knew of William F. Durant till yesterday.

The only persons whom I supposed composed the firm of Davis, Sprague & Co., or Davis & Associates, in '67, '8, or '9, were Davis & Sprague.

I hardly base my belief as to the identity of Davis, Sprague & Co. with James W. Davis & Associates, on the fact that they were both engaged in like business, and their operations carried on simultaneously, but because of frequent references made to the firm on the road by different parties, the most of whom I did not know.

I was aware that both the names, Davis, Sprague & Co. and James W. Davis & Associates were used in commercial transactions.

None of the partners ever stated to me that the firms were the same.

I never had any conversation with any member of the firm, or any one purporting to be a member, or in their presence, unless it was with Gessner, if he was the one who is party to this suit.

I have been Rogers' attorney. Was first retained by him when he was a county commissioner on some tax matters, and again in a suit brought against the Rocky Mountain Coal Company. Also in a suit brought against him on his bond. Also when he was cashier of the First National Bank in regard to an assessment. That is all.

I don't care to say anything on my own behalf in regard to the matter.

173 . RUDOLPH GLOVER, being produced as a witness for complain-

ant, at Cheyenne, on the 13th day of April, 1877, testified as follows at said examination:

I am 33 years of age. Live in Cheyenne. Have known Rogers about 10 years. I have had a slight acquaintance with Ruth, and knew Davis. I have seen Sprague and Davis, and met Ruth. In '67, '8 and '9, I lived here, in Green River, South Pass, and Bear River, and was engaged in the drug business.

I was acquainted with the business men along the line of the U. P. R. R. Co. I knew a firm delivering ties in those years. It was called Davis & Associates.

There was a concern known by the name of Davis, Sprague & Co., I believe.

I don't know whether there was or was not any distinction between the two. My impression is that they were looked upon as about the same concern, but that is only an impression.

I had business with the firm in 1868, but don't recollect under what name.

I think James W. Davis & Associates were delivering ties in 1868.

I don't know where the headquarters were.

Davis and Sprague gave their personal attention to the business. I don't know whether or not there were others. I had heard of Mattox.

Cross-examination:

My impression is that the public belief was this:

That in those years, or some of them, there was an association, or firm, furnishing ties to the U. P. R. R. Co., and doing business under the name of Davis, Sprague & Co., and also a firm, or association, likewise furnishing ties to the road, and doing their business under the name of James W. Davis & Associates, and that they were considered by the public to be identical, and made up of the same persons. I can't give any particulars as whence I derived my information.

There was a firm carrying on business by the name of Davis, Sprague & Co., I always supposed.

I have no knowledge, either personal or derived from statements of any of the defendants in this suit, as to who in fact were interested in either Davis, Sprague & Co., or James W. Davis & Associates.

174 NICHOLAS J. O'BRIEN, being produced as a witness on behalf of complainant, at Cheyenne, April 13th, 1877, testified as follows:

I am in the wagon trade. In '67, '8 and '9, lived in Cheyenne.

My first official position was alderman of Cheyenne. Next was deputy sheriff, and afterwards was United States marshal. As such I commingled with the people pretty generally, and was acquainted clear through to Ogden.

I knew some of the railroad men very well; some I did not.

I knew persons engaged during those years in furnishing ties and lumber to the U. P. R. R. Co. There were different parties. Davis, Sprague & Co., and Davis & Associates, Charles Bussard, and McCord.

I don't know where Davis, Sprague & Co.'s principal office was. I think Evanston. I was very well acquainted with Davis, Sprague & Co.'s book-keeper, Christopher. Also with Rogers, whom I have known since '64 or '65. I first got acquainted with him in Denver. I know Dr. T.

C. Durant very well; also Ruth. Had a passing acquaintance with Davis. Know William F. Durant. Don't know Sprague nor Richards.

It was always my understanding, that is, I don't know positively, that these two firms were the same—one and the same firm. They were all spoken of by the public as one firm.

I have heard Lathrop speak of them as Davis & Associates, and Green, as Davis, Sprague & Co. They might be different from what I know in both matters.

I first heard of James W. Davis & Associates in '67 or '68, when the road was being built, and Davis, Sprague & Co. about the same time.

I don't remember where I last saw W. F. Durant, nor how often. I have seen him several times passing on the trains back and forth.

Cross-examination:

I did not know who composed either Davis, Sprague & Co., or Davis & Associates, but I always supposed that whatever parties were represented by the name of Davis, Sprague & Co., were also represented by the name of Davis & Associates. That is, that although there were apparently two different firms, they were really the same individuals.

I never had any conversation with any of the defendants in this suit as to who composed Davis, Sprague & Co., or Davis & Associates;
175 nor heard any conversation when any of them were present, except once in Ruth's store, somebody asked how many men is connected with the firm of Davis & Associates, and there was no answer.

I think I served some papers in a suit for Lowry & Upton against one of these concerns, though I am not positive.

I could not give the date when I saw W. F. Durant in the Territory. I think I saw him with his brother, but could not say when. I am very near positive that I saw him. I saw him in Omaha in 1866, but never saw him in any other place here.

I was very intimate with Van Tassel, and we were together a great deal when he would come down here. He was working for Davis, Sprague & Co., or Davis & Associates. R. S. Van Tassel now lives up at Sidney.

I never had any conversation with any of the parties I have mentioned, in relation to the identity of the two firms.

I lived here before there was a house in the town, or before there was any Cheyenne.

I think Rogers was in the banking business in Denver. He came here from there.

I saw Christopher about 10 days ago; saw him every day. He didn't talk about Rogers' matters. He spoke of people here in Wyoming. Then Rogers' name was mentioned. I think he asked me where Rogers was, and I told him Appleton, Wisconsin.

L. C. STEVENS, being produced as a witness for complainant, at Cheyenne, April 13, 1877, testified as follows:

I am a real estate agent, and have lived in Cheyenne since the summer of 1867. I was acquainted as far west as Wasatch, Utah Territory, in 1868, with the business men along the road.

I knew a firm of Davis & Associates, or Davis, Sprague & Co.

I met Mattox, and made some arrangement by which I was to be em-

ployed by the company, either in December, 1868, or January, 1869. They had their office then at Bear River City, which is 150 miles west of Elk Mountain.

The first I knew of the firm was as Davis, Sprague & Co., in Cheyenne or at Julesburg, in 1867.

176 I afterwards heard the name James W. Davis & Associates, late in the winter of 1867 or early in 1868, to the best of my recollection, at Cheyenne, where I was until June.

I suppose their principal office was at Bear River City. I never met Davis until 1869. I was in Mr. French's office.

I did not know Sprague, Gessner, or Durant.

I understood Mattox to be the superintendent of Davis & Associates in getting out lumber at Bear River. He seemed to be the person in authority there, and I was referred to him.

Christopher was there as cashier or confidential clerk, as I understood.

As I understood it, Davis, Sprague & Co. and James W. Davis & Associates were reputed to be the same concern.

Cross-examination:

I never had any personal business transaction with either of these firms, except my talk with Mattox.

I never knew any other names than Davis and M. B. Sprague as being connected with the firm.

My understanding was that there was an association or firm furnishing ties by the name of Davis, Sprague & Co., and that there was also another association of individuals or firms furnishing ties and timber to U. P. R. R. Co., which did business under the name of James W. Davis and Associates, and my understanding, from general reputation, was that they were composed of the same persons.

I recollect when I first heard the style Davis & Associates used, having some conversation with a person of my acquaintance, and he told me of the change in the style of Davis & Associates; said they had changed the style of the firm.

The public rumor, as I recollect, was that there was no difference, or, if any, a distinction without a difference.

I never saw William F. Durant.

The only conversation I recollect in regard to these names was the one with Millspaugh in Cheyenne, and that because it was the first time that I had heard of the change of the—or the adoption of the style of Davis & Associates.

I went into I. W. French's office in March or April, 1869, and
177 stayed until July or August, 1870. I am not an attorney at law.

I am the partner of W. W. Corlett, but not a law partner. Have read some law. I manage the real estate business.

I have seen Christopher, frequently, during this year, and talked with him. I have known Rogers since 1867.

POSEY S. WILSON, being produced, as a witness on behalf of defendant William F. Durant, at Cheyenne, April 13, 1877, testified, as follows:

I was in the banking business here, 7 or 8 years ago, but am not in business at present. I came to Cheyenne in September, 1867.

I have known Rogers, personally, since I came here, and knew him, by sight, in Denver.

I have known Charles D. Sherman since '66–'7. I knew him before he came here.

In 1867, '8, and '9, I knew of the name of Davis, Sprague & Co., being used to represent certain persons furnishing ties and timber to the U. P. R. R. Co. Also knew of a firm by the name of James W. Davis & Associates, being used to represent persons in like business, but I think that firm was organized later; I think in 1868.

I boarded at the same place with Sherman in the winter of '68–9, and we were together a good deal. I asked him if Davis, Sprague & Co. were partners, or could be held liable for Davis & Associates' obligations.

I was afraid of Davis & Associates, and in trying to get at their liability, I thought Sherman had means of finding out that I hadn't.

He told me they were different firms; one could not be held for the other, and they were distinct, and Mr. Rogers told me about the same thing.

I talked with Sherman more than once upon this subject, and that was about the substance of it. He and I had a quarrel once. I thought he gave me some wrong information about them.

This last occurrence was in March or April, 1869. He got me to take a lot of Davis & Associates' paper, checks on Kountze Brothers, of which he was cashier, and he told me that they would pay them out of some vouchers that they held, but they didn't pay them; gave as an excuse that they couldn't get the vouchers, and then I wanted to know if Davis, Sprague & Co. could be held for it, and he told me they were different
178 firms. I investigated it as far as I had any means of finding out whether or not they could be held for the other.

I had claims against both firms.

I talked with Rogers on that subject at his banking-house here in Cheyenne, in the spring of 1869, probably in February or March. I was just trying to find out whether the claims of one were good against the other, and he told me that they were not.

I talked with him several times on the subject, most always at his place of business, I suppose; may have been on the street.

He used to say that Davis, Sprague & Co.'s paper was better than Davis & Associates, and in speaking of their being distinct, he said that at some of these interviews. That was in his banking-house, after he and Mr. Sherman had gone into business.

Q. "Who was present, if any one, besides you two?

A. "I don't know that any one was paying any attention to it. Mr. Wild and Mr. Hoyt—John E. Wild, of the First National Bank, and some of the clerks. Wild and Hoyt, I think, were clerks at that time."

Cross-examination:

I don't know that either of the clerks heard this conversation. I am not sure that they were both in. I say they were clerking for him at the time. I am not sure which one was present; one or the other was, because Rogers was not the only man in the bank.

If Wild had been present, he could have heard it. It was near his desk.

Sherman and I are very good friends now. I don't think much of

Rogers. He is under indictment here for stealing. I haven't a very good opinion of him.

Q. "What are your feelings towards him. I want an answer responsive to the question?

A. "Well, I entertain feelings of contempt for him; about the same as I do for you."

Rogers was a defaulter in the bank. That is all, why my enmity grew out of it.

He was a defaulter in the bank of which I was a director.

I may have alluded to the fact of Rogers being indicted often,
179 probably did. I endeavored to secure his indictment, and wanted him arrested at the time he was a defaulter; up to that time we had been intimate friends.

Mr. Hoyt is in Chicago last I heard of him. I am quite certain that Hoyt or Wild was present at the bank at that last conversation. I don't say that whoever was there would hear the conversation, but that if Wild was present and paying attention he could have heard, because I was near to his desk, but was not near Mr. Hoyt's.

I brought one suit against Mr. Rogers since 1870. In 1871 I was a stockholder and director in the First National Bank of Cheyenne. I was not more active in causing Rogers' resignation as cashier of that bank than any other director. They all wanted him to resign.

Q. "Did he not offer to secure the bank for all that he owed, with the paper of this Davis, Sprague & Co., and the paper of this Davis and Associates?

A. "He showed a list of paper that he had, and said that he would turn it over to the bank, if it would take it unconditionally—just buy it, take it as if it was money."

He didn't offer to turn over to the bank as collateral to secure any deficiency in his account, paper of Davis and Associates, or Davis, Sprague & Co., or both, or their commercial paper to the amount of about $80,000. He offered to let the bank take it just the same as if was money in place of the money that he had stolen, and they couldn't do it because it was old, past-due paper.

I use the term "stolen" because he stole the money.

I know it, because I had access to the books and papers, and he admitted it to me.

The money came lawfully into his possession. He was cashier of the bank at that time. The bank had been opened for business, and he was elected and acting as cashier. He stole it, because he applied it to his own private use.

Q. "Then some other term besides 'stolen' would designate the act?

A. "Well, there are different ways of stealing. That is one way. I considered it stealing."

As to their being a difference of opinion between the directors, Mr. Knuckolls, Mr. Iliff, General Duncan, and I, acted in concert in the directory.

180 Mr. Knuckolls and Mr. Iliff took a very active part in procuring the indictment of Rogers. The other directors testified before the grand jury, I suppose. I don't remember of their taking any active part in the matter.

Mr. Iliff, Knuckolls, and I got out of the bank in June, 1871, and Duncan about that time.

The bank has been carried on since then. A. R. Converse was a director.

I don't know about any adjustment with Rogers. The only thing I have heard since I got out was the amount of his indebtedness.

I don't remember how much paper he offered the bank. He made a list of the notes, but never brought the notes themselves and offered them, and I never could get him to do it.

They were lying in the safe in the bank, and he took them out unknown to anybody.

He took the notes away after he resigned as cashier, but while still a director. They were his private papers lying in the safe there, but he had entered them up on the books of the bank as the bank's property, but they were not accepted by the bank. He had the right to take them away. Nobody objected to it; he promised to turn them over.

Redirect examination:

I heard Mr. Converse say, several years ago, that Mr. Rogers' indebtedness to the bank was thirty odd thousand dollars.

Q. "Please explain the particulars of this embezzlement of Mr. Rogers, and how it occurred, and state all you know about it."

WITNESS. Well, there was a party of us organized the national bank here, paid in our first assessment of fifty per cent. of the capital stock to Mr. Rogers, who was the cashier then. Mr. Rogers went on East, and bought the bonds while he was East, but instead of using the money that we had given him, he borrowed $25,000, and bought, instead of $50,000 worth of bonds, $30,000. Then, when he returned, he opened the bank one Monday morning, and transferred all his obligations. He would take a pass-book of Rogers & Co., from one of his depositors, transfer the balance to a pass-book of the First National Bank without transferring the money with it from Rogers & Co.

He turned over the liabilities of Rogers & Co. to the First Na-
181 tional Bank, and entered them on their books, and gave credit to the creditors of Rogers & Co., in like amounts upon the books of the First National Bank, but failed to turn over the assets of Rogers & Co., which represented its liabilities, or secured them.

At that time the capital stock of the First National Bank was $100,000, fifty per cent. paid up, but in consequence of these transactions of Rogers, it was obliged to reduce its capital stock $25,000.

The bonds I spoke of that he was to buy were to deposit with the Comptroller of the Currency, under the banking act, but he used the money given him to buy bonds with in his private business, and borrowed $25,000 on the credit of the bank in New York, unknown to the directors. The bank had a suit over it, which was pending when I left it.

Recross-examination:

The suit I brought against Rogers was under one section of the national currency act, which states that a director or cashier is liable to any stockholder for any damage to his stock, which is the result of the act of the director or cashier.

It was based on that. I was beaten in the suit, on the ground that the

bank was liable as a corporation. I then sued the bank and the court decided that no one was liable.

JONATHAN E. WILD, recalled as a witness for complainant, at Cheyenne, April 13, 1877, testified as follows:

I was in the same banking establishment with Charles D. Sherman and L. Hoyt, in the month of April, 1869.

I don't remember Mr. Wilson's coming in there, upon any occasion, during those months, and having a conversation with Sherman or Rogers, about the paper of Davis and Associates, or Davis, Sprague & Co.

I don't remember ever to have heard Sherman or Rogers say, in the presence of Wilson, that Davis, Sprague & Co. was different from the firm of Davis and Associates; nor did I hear Sherman give any excuse to Wilson about that time, in relation to certain paper which he held of Davis, Sprague & Co., that he couldn't pay the paper of Davis and Associates, because it was a different firm.

I had no connection with the First National Bank from the time of signing articles of incorporation in 1870, till its organization in February or March, 1871.

182 Afterwards I was a clerk in it. The directors in 1871, say up to July, I can tell pretty near.

Knuckolls was one, Wilson was one, Iliff was one. I was well acquainted with Knuckolls and Iliff. I never heard those two accuse Rogers of any criminality in relation to his dealings with the bank, nor any of them, except Mr. Wilson.

I know who procured the indictment against Rogers after he left the Territory. I am not aware that Wilson, or the United States officials, have made any attempt to prosecute Rogers.

I think Hoyt was in the bank with me in March and April, 1869. Sherman and Rogers were there, off and on.

Cross-examination:

Wilson was in Rogers & Co.'s bank occasionally, during those months.

Q. "Will you please furnish to the examiner a sworn copy of all the accounts of either H. J. Rogers, or H. J. Rogers & Co., with the First National Bank of Cheyenne, of which you are cashier, at any time?

A. "Can't do it.

Q. "Why not?

A. "Without the order of the directors.

Q. "Have you the books here in the bank, the bank books?

A. "Yes, sir.

Q. "Will you please produce them here before the examiner, now?

A. "Can't do it.

Q. "Why not?

A. "I have no authority.

Q. "Are you forbidden to do so?

A. "No, sir.

Q. "Then I understand that you refuse to produce them?

A. "Yes, sir; except on the order of the directors."

S. B. REED, being produced as a witness on behalf of complainant, at the city of Joliet, Illinois, April 27, 1877, testified as follows:

I am a civil engineer, and live in Joliet.

I was in the employ of the U. P. R. R. Co. from 1864, '5, '6, '7, '8, and '9, as general superintendent, and chief engineer of construction,
183 for contractors for building the road from a point twenty miles west of Omaha to the western termination.

I was acquainted with Davis. I might have been with this association, if I knew who they were.

I was acquainted with a firm of that name. My recollection is that they commenced in 1868.

The first ties that were delivered by the association was in the first range of mountains, know as the Black Hills. Previous to this ties were furnished by various contractors; anybody that could get ties for us, and some by day's work. Besides buying of contractors we also bought in Chicago, Iowa, Minnesota, and Wisconsin.

I can't tell when the contract for a million ties was closed without referring to the accounts.

The same gentlemen that commenced delivering ties and timber and lumber on that contract continued through to the end; that is, I mean till the road reached the Central Pacific.

All bills for material furnished along the line of road was paid from my office; that is, from my cashier's office, the vouchers being made out and approved by me. I have no vouchers in my possession.

The vouchers from these persons furnishing ties were generally made in the name of "Davis and Associates."

I don't recollect how far the million-tie contract extended.

I don't recollect ever receiving any official notice of the change in the firm of Davis and Associates at any time. I think the first ties that were delivered in the Black Hills the vouchers were made in the name of, I think, perhaps M. B. Sprague & Co. I am not positive, but soon afterwards I had orders to change the vouchers to Davis and Associates.

I think they were made in my office in the same way after that through to the end.

I generally made payments monthly.

I don't recollect how many payments were made in the name of M. B. Sprague & Co.

I don't know when the million-tie contract was made.

In the fall and winter of '67 and '8 my headquarters were in Cheyenne, afterwards at Laramie, and beyond that in camp along the track, finally at Echo. Goods used to be shipped over the road to those parties in the name of Davis and Associates. They were furnished a large
184 amount of supplies from the construction department, which kept supplies on hand and sold to them, as we did to all other contractors, but the accounts were kept in the name of Davis and Associates in the storekeeper's department.

I knew Mattox, who was cashier for the tie contractors at one time.

I don't recollect Mattox coming to me in November, 1868, and stating that the million-tie contract was ended, and he desired to have a general settlement of all matters up to that time. He might have done so. I don't recollect making a final settlement at that time, though I might have done so. There was a final settlement made some time in 1869. I think it was after the last rail was laid.

Q. "Did you have charge of the accounts with this association of tie contractors for supplies obtained by them from the company?"

A. "I had general charge of all the contractors' business for building the road, including the furnishing of supplies."

The accounts were kept with this association generally in the name of Davis & Associates.

In November, 1868, I was out in the Salt Lake Valley, somewhere beyond Cheyenne. I think the delivery of ties was continuous to the end of the work.

Witness states on his own behalf as follows:

In part of 1868 there was a man named Evans, who was in charge at the end of the track, and did the business there, and made some vouchers for the various contractors.

Cross-examination:

I don't know who was interested in the million-tie contract except Davis.

I might have made outside contracts with Davis or the parties interested with him, but don't remember.

I made no written contract.

I had a cashier who kept the account of moneys in my office. W. P. Kennedy was his name.

After the completion of the road all construction books and vouchers were taken to Boston. There we had a settlement with the general office, and they were turned over.

I don't recollect ever receiving any official notice of change in
185 Davis & Associates firm, but there were rumors to that effect in the winter of '68 and '69.

I heard while on the road of an association called Davis, Sprague & Co.

I used to hear unofficial rumors of Davis, Sprague & Co., and, as I have stated, I think the first few vouchers were made in the name of M. B. Sprague & Co., or Davis, Sprague & Co. I don't recollect now which. If there was any such firm they were getting out ties and timber.

I found out about the shipping directions on the goods for these contractors, by seeing the marks.

I don't know how the company made out their freight bills.

These shipments of freight and supplies along there were made to the parties interested in the million-tie contract, at Cheyenne, and various points.

I have no personal knowledge of the making of drafts for the payment of ties. My cashier made them.

I never saw two drafts for $53,000 each, made about the 3d of May, 1869.

I remember when Dr. Durant and others were corralled in a train at Tie Siding, and was told that drafts were given about that time.

I have heard of the New York suit.

I used to look over the books in the supply office frequently.

In November, 1868, I was in Echo and Weber Cañons in the Salt Lake Valley; my office was there. I carried my office with me.

When the accounts for supplies first commenced, I think they were kept in the name of Sprague & Co., or Sprague & Associates, or something of that kind, I don't recollect which.

The orders I received to keep or make vouchers in the name of Davis

& Associates, or to change to Davis & Associates, were from Thomas C. Durant.

I think it was in the fall of 1868 or winter of 1868–'9.

Q. "You stated that the same men who commenced the million-tie contract continued through to the end that is, until the road was completed to Promontory. How do you know that when you can't tell who were interested?"

WITNESS. Well, the accounts were kept in the same name. That
186 was the only way I knew, and Davis and the same parties substantially were in charge of the work.

I knew a good many of the foremen; one was M. T. Seymour.

All the money under the million-tie contract was paid through my office or Mr. Evans.

These tie contractors all used their own blanks.

I have known Rogers nine or ten years, and have been interested with him in some business matters; we owned a coal mine together at one time, the "Wyoming Coal Company."

I would like to get the value of 250 shares of stock in that coal company that I was euchered out of. I discovered that coal and opened it, and put a man on there, and finally the thing was organized into a company. I was to have 250 shares of full paid stock, but never got a cent of it. That is the only transaction I have ever been interested in with Rogers.

Counsel for William F. Durant enter a general objection to the testimony of Mr. Reed on the ground that it is not in rebuttal of any testimony on the part of the defense.

Redirect examination:

I don't recollect definitely how long after ties were furnished under the million-tie contract I made the change in the vouchers, but from two to six months, I think.

Deposition of P. S. Mattox, produced as a witness for defendant Durant, at Wyoming, April 30, 1877.

Christopher's position in the office of Davis, Sprague & Co. was that of book-keeper, and his salary nine hundred dollars per annum; he never occupied any other position for them.

He was not assistant cashier for them at any time. He kept part of the accounts for Davis, Sprague & Co., but he did not take charge of the cash.

I carried the key to the safe, and he had no authority to draw checks, except occasionally during my absence, when I authorized C. D. Sherman, cashier for Kountze Bros. & Co., to honor checks signed by him, telling Sherman on what accounts they were drawn.

In the month of August, 1868, Davis, Sprague & Co. were not
187 furnishing any ties west of Cooper's Lake. Cooper's Lake is east of Elk Mountain.

Davis, Sprague & Co. did not get out any ties west of Cooper's Lake, but ties which were got out there, and east of that place, were used west of there. Big and Little Laramie Rivers and Cooper's Lake are east of Elk Mountain. North Platte River, Green River, Piedmont, and Tie Siding are west.

The books of the million-tie contract contractors were kept in the name of Davis, Sprague & Co., and no change was made until the completion of the contract, when Davis notified me, as cashier, to close up all accounts pertaining to the contract, and keep the others separate and in the name of James W. Davis and Associates.

I told Christopher the million-tie contract had been completed, and what Davis had instructed me. It was in November, or about December 1, 1868, that I told him at Fort Saunders, and were the first instructions I gave him in regard to the change of the firm.

M. B. Sprague at one time had the million-tie contract, and gave it to me, and I kept it in the safe of the office, to which Christopher had occasional access, when the contract unaccountably disappeared. Afterwards, in 1872, I saw it in the possession of M. B. Sprague and Christopher, in New York City.

The time checks, freight bills, &c., were kept in the name of Davis, Sprague & Co.

The witness produces specimens of the freight bills, twelve in number, which are as follows:

166.] F. SANDERS, *July* 15, 1868.

M. Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
96 sacks bacon	10,000		300 00
[Two-cent stamp.]			$300 00

Received payment for the company.
No. W. bill, 499.] E. G. NORTHUP.

(Endorsed:) July 15th, '68. $300.00. U. P. R. R. f'ght bill.

188 FORT SANDERS, *July 9th*, 1868.

Messrs. Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
Goods as per W. bill No. 303	12,530		392 81
Less frw'd harness			1 05
[Two-cent stamp.]			$391 76
			$392 81

Received payment for the company.
No. W. bill, 303.] E. G. NORTHUP.

(Endorsed:) Goods now unloaded. E. & O. E. E. G. Northup.

FORT SANDERS, *July 9th*, 1868.

Messrs. Davis, Sprague & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
1 Brl. castings, 1 bx. H. ware			
8 bdls. C. kettles; 10 cast-iron covers; 24 cast-iron ovens, "O K."	580		19 75
			$19 75

Received payment for the company.
No. W. bill, 320.] E. G. NORTHUP.

(Endorsed across face:) Ent'd folio journal 73.

(Endorsed on back:) Goods now unloading. E. & O. E. E. G. Northup.

189 158.] F. S., *July* 10, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr, for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
150 sacks corn			
9 " bacon	20, 700		508 00
			$508 00

Received payment for the company.
No. W. bill, .] E. G. NORTHUP.

FT. SANDERS, *July* 25, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
1 case mdse			
1 bx. H nails			
1 pa. stocks and dies			
1 bx. H ware			
1 keg H shoes			
2 bdls. iron	5. 50		17 95
Total			$17 95

Received payment for the company.
No. W. bill, 882.] E. G. NORTHUP.

FORT SANDERS, *July* 25, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
6 brl. salt			
10 " d. apples			
3 " vinegar (O. R. L.)			
6 cans lard	5,150		162 60
			$162 60

Received payment for the company.
No. W. bill, 843.] E. G. NORTHUP.

190 145.] JULY 29, 1868.

M . Davis, Sprague & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
5 sacks hams	500		15 00
			$15 00

Received payment for the company.
No. W. bill, 964.] E. G. NORTHUP.

FORT SANDERS, *July* 28, 1868.

M . Davis, Sprague & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
1 case mdse	150		5 25
			$5 25

Received payment for the company.
No. W. bill, 922.] E. G. NORTHUP.

SEP. 30, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
1 bdl. blankets	400		14 00
			$14 00

Received payment for the company.
No. W. bill, 1186. No. car, 488.] B. F. BACON.

(Endorsed across face:) Entered Perry, 2,300.

191 SEP. 23, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Descripton of articles.	Weight.	Back charges.	Our charges.
5 bag coffee	800		26 00
1 case R boots	100		3 50
			$29 50

Received payment for the company,
No. W. bill, 874. No. car, .] BACON.

SEP. 19, 1868.

M . Davis, S. & Co. to Union Pacific Railroad Company, dr., for freight from Omaha.

[Cash in all cases on delivery of goods.]

Description of articles.	Weight.	Back charges.	Our charges.
1 bx. of Ox. shoes	100		3 00
			$3 00

Received payment for the company.
No. W. bill, 735. No. car, 650.] B. F. BACON.

None, except myself, had authority to sign receipts or receive money for ties east of Elk Mountain, except such as I authorized to act in my absence.

During my absence Christopher might have received money for ties east of Elk Mountain, but on my return I would have signed receipts for any such sum.

I have heard Davis say, and he has told me repeatedly, that neither W. F. Durant, nor any one but himself and Gessner, composed the firm of contractors getting out ties west of Elk Mountain.

I have heard Davis tell Christopher that the tie business west of Elk Mountain was a separate concern from that doing business east of that point.

192 It was generally known along the line of road that I was a partner in the tie contract east of Elk Mountain, and Christopher knew it. T. C. Durant told him so in the fall of 1868, in my presence, at Fort Saunders.

I never, at any time or place, told Christopher that anybody besides Davis and Gessner was interested in the firm of, or were partners in, James W. Davis and Associates.

I never opened any bank account with H. J. Rogers & Co., of Cheyenne, or, to the best of my recollection, with Rogers, at Laramie. I have known Rogers from the summer of 1868.

I was in New York while this suit was pending there.

I saw Rogers there, and understood his business to be connected with the claim against Davis & Associates.

Rogers told me that he was sorry his claim was not against Davis, Sprague & Co.

This conversation occurred in New York, when he and myself were on the way to Fulton Market, for oysters.

Davis told me to go from Fort Saunders to Gilmer, and take charge of the work and estimates of Davis & Associates, as soon as I could get the affairs of Davis, Sprague & Co. closed.

As nearly as I can recollect I came west, and became connected actively with the work on the million-tie contract about the 8th or 10th of May, 1868.

I took charge of the office in June, 1868.

The first payment I made was in that month upon a draft upon me given by Davis, in favor of A. G. Lathrop, for $500, and signed in the firm name of Davis, Sprague & Co.

This draft was presented by a party of the name of Hughes, an agent for Wells, Fargo & Co.'s Express Company.

The witness produces the draft, which is marked Exhibit B, and is as follows:

"$500.] CHEYENNE, *April* 28, 1868.

"P. S. Mattox: Pay to A. G. Lathrop & Company five hundred dollars, and charge to the account of—

"DAVIS, SPRAGUE & CO.,
"By J. W. DAVIS.

"Fort Saunders, D. T."

[Two-cent revenue stamp.]

193 Endorsed:

"A. G. LATHROP & CO."

Also, "Pay agent Wells, Fargo & Co., or order.

"KOUNTZE BROS. & CO.,
"SHERMAN."

I never drew any check on Kountze Bros. & Co., or any other bankers, to pay time drafts or acceptances of Davis, Sprague & Co., made in the fall of 1867, and maturing in January or February, 1868, to the amount of about $20,000, and signed said checks with the names of James W. Davis & Associates, by or per P. S. Mattox, cashier, that I remember of.

I never told Charles D. Sherman that I was interested in, or a partner in, James W. Davis & Associates.

I told him the firm was changed after the million-tie contract was completed, and that I was acting simply as cashier to James W. Davis & Associates.

At one time Sherman told me that Rogers had a considerable amount of Davis & Associates' paper offered to him for discount, and that Rogers had asked his (Sherman's) advice as to discounting.

Sherman also told me that he advised Rogers not to buy any paper of Davis & Associates, but that paper of Davis, Sprague & Co., signed by me, was good.

This conversation occurred in the latter part of the summer or early in the fall of 1869 at Cheyenne.

I was present as a witness on the trial of a suit brought by Christopher against Augustus Kountze, or against him and others, in New York City, in the fall of 1876, and so was Sherman. We traveled from Chicago to New York in company.

Sherman said that he did not recognize Christopher as cashier, and that he paid checks of Davis, Sprague & Co., signed by him, only upon instructions from me, which I would give him when about to be absent.

Cross-examination:

While I was cashier and Christopher was assistant cashier, the latter paid regard to my orders, and consulted me as his superior in office.

I employed him, and had full authority to discharge him at any time.

Christopher did not sign receipts for money from the U. P. R. R. Co. These receipts would not have been accepted.

194 J. M. WOOLWORTH, being produced as a witness on behalf of defendant Durant, at Omaha, on the 4th of May, 1877, testified as follows:

I am forty-seven years; my occupation, a lawyer, and live at Omaha.

I know Davis, Rogers, and Durant. I have known them six or seven years. I have met Mr. Richards once, a long time ago. I don't know who the other parties to the suit are.

I know of the New York suit, so called. I was attorney for defendants Davis and Gessner, and appeared for them in New York, in the fall of 1870, before the referee, and also for all parties interested in that behalf, in resisting claims of creditors.

Rogers filed several claims in the case, in order to have the same allowed and paid him out of funds in the hands of the trustees for the U. P. R. R., and which it was expected would be recovered from them in the suit.

Several of these claims Rogers withdrew from the consideration of the referee, after having filed them.

His right to do this was the subject of discussion, I think, before the referee, and between Bell, who represented the plaintiffs in the suit, myself, who represented Davis & Gessner, and Rogers himself, the question

being whether he had the right to do so, and what the effect upon his rights would be if he did so.

I took the position that he had the right to withdraw his claims, if he saw fit, as any plaintiff might in an original action, or as a defendant might a counter-claim or set off.

What the effect of his having appeared in the proceeding might be, was a question which I did not think it necessary for me to express an opinion upon.

I do not think we came to any distinct agreement or conclusion upon that matter.

Other claims of his were presented, and my best recollection is that certain of them were resisted, and others of them allowed without resistance.

The claim alleged by him in favor of Young & Co., Mr. Davis insisted was unjust. My recollection is now, that we entered upon an inquiry as to its validity before the referee, and that, pending the inquiry, Rogers and Davis came to some agreement about it, in consequence of which our resistance was withdrawn.

195 At any rate, our objections to it were notified to the referee, so that we would have been heard but for the agreement between the parties. The same is also true, I think, of some other claims alleged by Rogers; but I cannot now mention them.

I cannot state what claims, alleged by Rogers, were allowed by the referee. His report will show that. I have not got it before me, nor have I seen it in a long time.

My recollection now is that Mr. Rogers appeared at first on his own behalf, and presented his claims, and that after that Mr. Stiger, of New York, appeared for him. Mr. Stiger was brought into the matter by Mr. Rogers because of the resistance, or threatened resistance, to his claims.

My recollection is that Rogers was sworn as a witness, both upon the main question at issue between the plaintiffs in the suit and my client; and also in support of some or all of his claims.

He was personally present at a number of the examinations had before the referee, not only upon the issues as between the plaintiffs and my client, but also the question between plaintiffs and my client, and others interested with them on the one side, and the trustees for building the railroad on the other side, and also upon the validity of claims alleged by creditors.

I cannot enumerate the different claims alleged by Rogers at this time.

The main questions at issue between plaintiff and my client were whether there were two firms, namely, Davis, Sprague, & Co., and James W. Davis and Associates; and whether these two firms were composed of different members, and engaged in different and distinct adventures, or whether there was but one firm doing business under these two styles, both composed of the same persons and engaged in one and the same venture.

Another issue was, what was the sum due these two firms together, or severally, by the trustees for building the railroad.

Then there was the other question, who were the creditors of the firm or firms? What was the amount of their claims respectively, and out of which funds, (if there were two), their demand should be paid? That is to say, whether all the creditors should be paid out of the whole sum recovered from the trustees; or, there being two firms, whether any particular creditor should be paid out of the sum to which one of the firms should be entitled, or out of the other fund.

The proceedings in the cause were the commencement of a suit,
196 by the service of a summons and complaint, with an order of injunction and appointment of receiver, the answer of Davis & Gessner, and reference to Mr. Redfield upon the several issues raised by these pleadings. My recollection is that there was a separate order or reference as to claims of creditors.

The first thing done before the referee was, if I recollect correctly, the taking of the testimony by him of the plaintiff Sprague and one Burnham, who alleged large demands against the two concerns separately. The testimony was directed to the point that there were two separate and distinct concerns. One, Davis, Sprague & Co., which had a contract for furnishing contractors for building the road with one million ties; the other, Davis and Associates, which had a contract or contracts for furnishing the rest of the ties required for building the road, or if not contracts, then a claim for ties furnished upon the quantum meruit.

These parties also gave testimony in support of the two claims of Burnham, one against one firm, and the other against the other.

After this, if my recollection serves me rightly, before any report of the referee, other claims were presented and inquired into, and also other testimony taken upon the issues between the plaintiffs and my client. This testimony was taken on the several issues upon a great many different occasions, without any regard to order, but to suit the convenience of parties and claimants; and upon some of the claims presented, the question and the testimony taken upon it was whether it was against Davis, Sprague & Co., or Davis and Associates, and also whether there was one or two concerns.

It became evident, very early in the course of the inquiry, that if it should be found that there were two concerns, and the sum coming from the trustees should be divided between them according to their respective rights, that the sum going to Davis, Sprague & Co. would be very large (enough, or almost enough, if not more than enough, to pay their debts, dollar for dollar), while the sum going to the other firm would be insufficient to answer any considerable part of their debts; and hence the effort was of many of the creditors to bring their claims in against Davis, Sprague & Co., and support the proposition of the plaintiffs that there were two concerns, while the effort was of the creditors who could not assert their claims to be Davis, Sprague & Co.'s, to support the proposition that there was but one concern.

Accordingly, upon some of the claims, this was the subject of inquiry. If my recollection serves me rightly, this was the case in respect to the claim presented of John McCormick & Co. I remember that Da-
197 vis insisted that their claim was originally brought against Davis, Sprague & Co. by collusion with the plaintiff Sprague. Upon very many of the claims no testimony whatever was taken. This was the case whenever the plaintiffs, who assumed to represent the interests of Davis, Sprague & Co. and my client agreed together that the claim presented was just.

The fullest possible opportunity was offered to all persons filing claims to be heard.

The contests in reference to the claims to be heard before the referee arose upon the filing of the claims with him by the claimants, verified by affidavit of the validity of the amount.

If the claim was contested, or it was made against Davis, Sprague & Co., when either of the parties thought it should be against Davis & Associates, inquiry was made before the referee upon those several points, and this inquiry was conducted precisely as if an original suit had been brought by the claimant and had been referred to the referee, excepting that there were no pleadings in the cause.

After inquiry had been gone into very fully on the main issue between the plaintiffs and my client, and, if my recollection serves me right, after the inquiries had been concluded upon the validity and correctness of the claims presented by creditors, the question of what was due from the trustees was entered upon, and occupied the attention of the referee mainly for some time before the closing of the hearing before him.

I live in Omaha, and was practicing law there in 1867, 1868, and 1869.

I did have business for the concerns, Davis, Sprague & Co. and James W. Davis and Associates. The business which I did for them began before the railroad was finished, when they were trying to get the trustees to pay them for their ties.

Before I was brought into this matter at all, several suits had been instituted in the courts of Nebraska for the recovery of what they had claimed against the trustees, and it had not been successful.

I also brought a suit in equity against the railroad company, the trustees, and others in Wyoming, in the name of James W. Davis, and on behalf of the members of the firm of Davis & Associates. The effect of that proceeding was to dispose both parties to compromise the matter. Negotiations toward that end were therefore entered upon, and I went to New York and Boston several times to conduct them.

For this purpose I had a power of attorney executed by Davis, Sprague & Co., James W. Davis & Associates, and Davis, individually,
198 and I effected an agreement of compromise which was signed by the trustees and by me as attorney in fact for all these parties, whose power I thus held; but I don't recollect having any other business for Davis, Sprague & Co., if that concern was one separate and apart from Davis & Associates.

During the course of some of the proceedings in New York, Mr. Rogers was there with Mr. Davis, in constant consultation with him, and he was fully advised of the claims made by each of the parties against the others, and deeply sympathized with the interest and claims of Davis & Gessner.

Cross-examination:

I am familiar, to some extent, with the practice in vogue in New York City.

I studied law in New York under the practice which now obtains there and practiced my profession there for two years. I have since been engaged in practice under a system of procedure, in its general features, the same.

I did not procure the assistance of Mr. Gillett to manage the interest of my client in the New York suit, not because of unfamiliarity with the New York practice, but because I lived so far away.

In the entry of the judgment, and proceedings after it, Mr. Gillett was more conversant with the case than I was. Before that I had a very full and exact knowledge of the proceedings.

On some matters he appeared before the referee alone, in my absence,

but I think I was always informed of what was done. Very likely in some small matters of detail, he was informed better than I. I was present while the claims of claimants were being proved up.

What I have stated in my direct examination as to Rogers and his proceedings in the cause, I state of my own personal knowledge.

I do not think that all or many of the claimants to the fund were used by the million-tie contractors as witnesses.

My best recollection is now that the testimony upon the issues between them and Davis & Gessner was all taken before the claims of creditors were acted upon by the court, but that testimony was not all taken before the claims of creditors were inquired into before the referee. I mean to say that the testimony was taken upon issues which were not raised upon the original pleadings, namely, the validity and amount of claims of creditors, and the parties against whom such claims ought to be allowed.

199 Also upon the issue how much was due from the trustees to each of the two firms, or the one firm doing business under the two names.

Rogers presented several claims, and afterward withdrew one or more of them. Some were disputed.

My recollection is that testimony was taken in support of or in opposition to them. If testimony was not taken in opposition to them, it was because of some agreement to that end between Rogers and Davis.

My recollection is that the question in dispute between the plaintiffs and Davis & Gessner, as to their being one or two concerns, was not decided before the claims of the claimants were taken up for consideration.

My opinion, as a lawyer, is that there was a personal judgment in favor of the claimants to the fund, and against the persons primarily entitled to the fund to this extent. I do not think that execution would go on the judgment against the latter parties, but I think that an action upon it would lie against them. They would be concluded by the judgment in respect of the creditors and the amount found due.

I do not think that the judgments in favor of claimants in that suit were in the nature of judgments in rem against the fund.

The bill was filed by the plaintiffs in behalf, not only of themselves, but also of the other separate classes of persons:

First. Those who held certificates of interest in the concern of Davis, Sprague & Co., and Davis and Associates.

Secondly. Creditors of the two concerns.

And I think that any parties coming under either of these descriptions, who voluntarily became a party to the proceedings, were personally concluded upon all questions determined upon the judgments.

There is another view which may be taken of these proceedings. I do not think that it is material whether testimony was taken upon claims of creditors before or after the question of partnership was decided. I suppose if the issues upon questions of partnership had been determined as it was, namely, that there were two firms, and had the sums coming from the trustees into the hands of the receivers been apportioned between the two firms by the judgment of the court, and so held by him, one separate and apart from the other, and then upon the foot of such a judgment or decree creditors had been advertised to come in and present their claims, and any creditor had done so, asserting his claim against one firm, and he has been paid out of the fund going to that one firm, he would necessarily have been

concluded by the judgment and his act, upon the question of there being two concerns, and upon the question against which of them his claim justly lay, and who were members of that firm.

200 That certainly is the case, according to my best opinion, in "Fargo's Proceedings," as, for instance, the administration of the estate of the deceased person in the English chancery.

As I have stated, I do not think the irregularity of these proceedings in respect of filing the claims and counter-claims, and orders of proof and so on, ought to be considered as affecting the rights of parties. In either of the aspects in which the proceedings are viewed, namely, as a proceeding by certain persons in behalf of others who voluntarily came in, and therefore became parties thereto, or secondly, an application upon the foot of a decree for the benefit of which I think the judgment in its nature was not in rem, but in personam.

It is a very hard question to answer whether or not, as a matter of fact, Davis, Sprague & Co. and James W. Davis & Associates were different names for precisely the same firm and association of individuals, and for the same business. Many of the members of the two firms, if there were two, and of the one firm, if there was but one, expressed contradictory opinions on the subject at different times. The same is also true of creditors—their several expressions varying according to what they considered to be their interest at that time.

I think that at an early day Davis claimed that there were two separate firms. That was before he ascertained that Davis & Associates were likely to come out far behind. At the same time, I do not wish to state this with any great positiveness, for during the first part of my connection with the business, and I think for several months, he was reluctant to take position on the question.

I had occasion to ask him and urge him very strongly to tell me who were members of James W. Davis and Associates, and he pretended to do so. He did not at that time state that W. F. Durant was a member of that firm, or had any interest in it, and some judicial proceedings were taken by me on the strength of his statements.

Afterwards he claimed that Durant was a member of the firm, because there was but one firm, who did business under two names.

Sprague also claimed at one time that there were two concerns, and afterward denied that such was the fact. Durant always insisted to me that there were two concerns, and that he was in no way interested in the latter. I think that at Omaha it was understood there were two concerns, but my information on this subject is very limited.

I do not know that James W. Davis always acted and held out to the community that there was but one firm, and that the two names represented only one firm.

201 I framed Davis' answer as directed by him, expressing in it what he at that time claimed, and not pretending to state my own opinion on the subject.

In Omaha, to which my information is limited, I think it was supposed that the two concerns, Davis, Sprague & Co., and James W. Davis & Associates, were separate and distinct, and not one firm.

All the business of both firms was not done under and in pursuance of the contract with the trustees for the furnishing of one million ties. Many

of the ties furnished at the west end of the road were on separate contracts for lots of ties and lumber, and others were cut and hauled to the road without any agreement whatever, and without any liability on the part of either the railroad company or its contractors to pay for them, and that was one of the main difficult matters in the negotiations for settlement, which I have spoken of before.

I do not know that any public notice was ever given in Nebraska of a change of firms by any of the tie contractors.

I drew Davis' answer to the New York suit.

JOHN MCCORMICK, being produced as a witness, at Omaha, on the 7th day of May, 1877, on behalf of the defendant Durant, testified as follows:

I am fifty-four years of age; a grain dealer, and reside in Omaha, Nebraska.

I have no personal acquaintance with the parties to this suit.

In the years 1867, 1868, and 1869, I lived in Omaha, and was engaged in the wholesale grocery trade.

I had transactions during those years with the firm of Davis, Sprague & Co., and also with the firm of James W. Davis and Associates, who were engaged in furnishing ties to use in the construction of the Union Pacific Railroad.

I don't know what the firm name of the million-tie contractors was, or what was generally known along the line of the road.

Cross-examination:

Nobody has seen me on behalf of William F. Durant. I have never received any letters from him or on his behalf. I have no such letters.

James W. Davis and M. B. Sprague both said to me that those
202 two firms represented different concerns. They said this about the time the business was transacted.

I have lived in Omaha for the last seven years, and been in the grocery and grain business, and was in the grain trade there last winter, and am at the present time.

JESSE H. LACEY, being produced as a witness on behalf of the defendant Durant, at Omaha, on the 7th day of May, 1877, testified as follows:

I am fifty years of age; I am a merchant, and live at Omaha.

I know James W. Davis. I believe that is the only one.

In 1867, 1868, and 1869 I lived in Omaha, and was in the wholesale grocery business.

I had business with the firm of Davis, Sprague & Co. during 1867, 1868, and 1869, but I don't recollect as to James W. Davis and Associates, whether I did or not.

It is my understanding that Davis, Sprague & Co., and James W. Davis and Associates were different concerns. I don't know as to the general understanding.

Cross-examination:

Nobody has seen me on behalf of W. F. Durant about my testimony in this case.

I never received any letter from W. F. Durant, or on his behalf, in regard to it.

I don't recollect now who told me these names represented different firms.

During the past seven years I have resided at Omaha. I have been in the wholesale grocery business, railroading, and in the retail grocery business, and am so engaged at present.

Deposition of WILLIAM R. STEELE, taken on behalf of the complainant, at Cheyenne, Wyoming Territory, June 16, 1877, who testified as follows:

I am thirty-four years of age; live in Cheyenne, and am an attorney at law.

203 I am acquainted with Rogers; have known him since 1869. I am not acquainted with William F. Durant.

I came to Wyoming in May, 1869.

I know an organization engaged in the business of furnishing ties and lumber for the U. P. R. R.

My first knowledge of them dates from May or June, 1869. The firm name was Davis, Sprague & Co., or James W. Davis and Associates. It was generally supposed to consist of Davis, Sprague, Durant, Gessner, and Ruth, and I have heard the name of Hermann Kountze, or Richards, mentioned as members of said firm.

I was acquainted in 1869 with a firm known as James W. Davis and Associates. I have no knowledge when they commenced doing business. I think it ceased in the latter part of the year 1869.

Its individual members were understood to be Davis, Durant, Sprague, Gessner, and Ruth.

It was engaged in the business of furnishing ties and lumber to the Union Pacific road.

I knew the firm of Davis, Sprague & Co. in the year 1869. I have no knowledge of when they commenced business. It was engaged in the business of furnishing lumber and ties to the U. P. R. R. It was generally supposed to consist of Davis, Durant, Sprague, Gessner, and Ruth.

I think the firm ceased doing business in the latter part of the year 1869.

I cannot say what relations the two firms sustained to each other.

I don't know how consignments of freight were made to and from Cheyenne and other points for any association of tie contractors.

I know of lawsuits being prosecuted in 1868 and 1869 against Davis, Sprague & Co., and Davis & Associates. There were, during that time, suits commenced by Lowry & Upton against Davis, Sprague & Co.; J. W. Collins against Davis, Sprague & Co.; Laycock against Davis & Associates; Wanless & Co. against Davis & Associates; Steele & Co. against Davis, Sprague & Co.; Ivanson against Davis & Associates; Cook against Davis, Sprague & Co.; J. W. Collins against Davis & Associates.

The association engaged in the business of furnishing ties to the U. P. R. R. was known and dealt with as Davis & Associates, and Davis, Sprague & Co., indifferently by both names.

My knowledge of said association only dates from the month of May, 1869.

204 I was employed by Davis & Associates as an attorney, in the month of July or August, 1869.

About the month of January, 1870, I was employed by the U. P. R.

R. as an attorney. My own knowledge in respect to the composition of those firms was derived as an attorney at law. I was present at the trial of all of the suits mentioned before.

I believe M. B. Sprague was sworn as a witness in the case of Lowry & Upton, in the case of Davis, Sprague & Co., and testified as to who composed said firm, on behalf of the plaintiffs, but I don't remember what his testimony was.

Cross-examination:

I am not acquainted with W. F. Durant, and don't know that I ever met him. My knowledge as to Durant's connection with the firm was, in the first place, by being informed some time in June, 1869, by one A. M. Burnham, a subcontractor of the firms of Davis, Sprague & Co., and Davis and Associates. My means of knowledge as to the composition of these firms is from general reputation.

I have no knowledge as to when Davis, Sprague & Co. commenced business.

I was employed by M. B. Sprague as an attorney on behalf of Davis, Sprague & Co.

I was attorney for the defense in the suit brought by Lowry & Upton. Said suit was brought against both the firms of James W. Davis and Associates, and Davis, Sprague & Co., judgment being rendered in the action against Davis, Sprague & Co.

I cannot specify the persons from whom I obtained this information as to the reputation of the firms.

I was one of the attorneys for Davis, Sprague & Co., and Davis and Associates, in all the suits mentioned in my direct examination, but cannot attach copies of the record in such suits, as I have not got them, and didn't know that any request would be made for them for either party.

I know some of the business men who dealt with, and gave credit to, the firms of Davis, Sprague & Co., and Davis and Associates. Of those who did so, I might name H. J. Rogers & Co., Edward Ivanson, Steele & Co., Laycock & Co., Wanless & Co., A. M. Burnham, A. J. Gill, and J. W. McIntyre.

The persons who were generally reputed to be members of the
205 firms of Davis and Associates, and Davis, Sprague & Co. were Davis, Durant, Sprague, Gessner, and Ruth. There were numerours parties present on the occasions of the trials of the various suits against Davis and Associates, and Davis, Sprague & Co.

I know Cornelius Christopher, and have known him since May, 1869. I last saw him about two years since in New York.

The only person with whom I have talked with regard to William F. Durant, within the last six months, is H. C. Whitney, the plaintiff's attorney.

I was attorney for Henry J. Rogers in some matters in the years 1871 and 1872.

R. S. Van Tassel, a witness produced on behalf of complainant, at Cheyenne, in the Territory of Wyoming, on the 18th day of June, 1877, testified as follows:

I am thirty-two years of age; live in Sidney, Nebraska, and am a stock raiser.

I have known Rogers about seven years. I know Durant. I met him

during the year 1868 and during part of 1869, at Fort Saunders, Wyoming, and different points west of there.

In 1867 I was in Colorado. In 1869 I was on the Big Laramie River, in the employ of Davis, Sprague & Co. Part of the year 1869 I was in the employ of Davis and Associates in the capacity of agent for the Pacific Mill Co.

I know an organization furnishing ties for the U. P. R. R., which was composed of M. B. Sprague, James W. Davis, and other persons, that used to give orders. The firm by which that association transacted business was Sprague, Davis & Co.

I was acquainted during the years 1867, 1868, and 1869 with the firm known as James W. Davis and Associates. That firm commenced doing business some time during the summer of 1868.

I don't know who were its individual members.

Its business was getting out ties, timber, and lumber for the U. P. R. R.

I was acquainted with the firm known as Davis, Sprague & Co. during the years 1867 and 1868. I don't know when the firm commenced to do business.

206 Its business was getting out ties, timber, and lumber for the U. P. R. R. I don't know of what individuals it was composed except M. B. Sprague and James W. Davis.

I never could tell any difference between the two firms. Goods were consigned to Sprague, Davis & Co. as far west as the Little Laramie, and from there to Promontory Point, to Davis, Sprague & Co. and Davis & Associates.

I know of lawsuits prosecuted against such associations as Sprague, Davis & Co. and James W. Davis and Associates. I knew of one at Laramie during the year 1868, and one at Bear River, against James W. Davis and Associates, in the spring of 1869.

I don't know by what name or names any association of persons engaged in delivering ties to the U. P. R. R. was dealt with and credited by the business men of the region in which they were operating.

An association furnishing ties changed the name of the firm in 1868, from Little Laramie River west, from "Sprague, Davis & Co.," to "Davis & Associates," but the same parties managed it.

I was with the U. P. R. R. Co. in 1865, at Rockport, in Nebraska, getting out ties and cutting lumber, under the supervision of M. B. Sprague; afterwards I was in the employ of Sprague, Davis & Co., in the capacity of agent, on the Big Laramie River. I was getting out ties up there.

Afterwards I was in the employ of Davis & Associates, at Bear River, Wyoming.

Cross-examination:

I have no knowledge of ever meeting Durant; I only know him by his being connected with the business about the office of Davis, Sprague & Co. and Davis and Associates.

I have no recollection of meeting him except at the office of said firm, which was at Fort Saunders and Bear River east.

I have no personal knowledge as to whether Durant was a partner of either of said firms; all I know is what Sprague told me.

I don't know when Davis, Sprague & Co. commenced business.

I was sent to Bear River by M. B. Sprague, with the understanding and

direction from him that James W. Davis was trying to make a separate firm, but that he, Sprague, would come up himself. Afterwards he came up and was in charge the same as when with M. B. Sprague, and Davis, Sprague & Co. This was in the winter of 1869. I drew my salary from Davis, Sprague & Co.

207 I have no knowledge of the suit brought by Lowry & Upton.

I have no knowledge as to the relations between the firms, except by common report, and my communications with them, and my orders from the office, which were signed either "Davis, Sprague & Co.," or "Sprague, Davis & Co.," I am not positive which, and afterwards by "Davis and Associates."

I was an agent, engaged in work, getting out ties, timber, and lumber.

I have heard both M. B. Sprague and James W. Davis speak of the change in the name by which said firm was doing business, said M. B. Sprague claiming there was no change in the firm, and Davis claiming there was a change from the Little Laramie River west.

I have known Cornelius Christopher since May, 1867; I last saw him in April, 1877.

I have known Rogers for seven or eight years.

I have not talked with anybody about this suit or Durant.

I have not received any letters from Rogers, and only one from Christopher, in the last six months, and that did not pertain to the subject of inquiry. I have had no connection with Rogers excepting banking business, as a depositor.

THOMAS C. DURANT, being produced as a witness on behalf of defendant W. F. Durant, at New York, on the 20th of June, 1877, testified as follows:

I know the parties to this suit, and I was vice-president and general manager of the Union Pacific Railroad, and also one of the trustees of the contractors.

An association that conducted their business under the name of Davis, Sprague & Co. had a contract for the delivery of one million ties, to be used in the construction of the Union Pacific Railroad, in 1868.

Q. "State whether or not, soon after Davis, Sprague & Co. commenced to deliver ties as aforesaid, if at all, you ordered the accounts of said tie contractors, and the vouchers made out to them, to be kept and made out in the name of Davis & Associates instead of Davis, Sprague & Co.; and if you say that you did, state whether or not you so directed S. B. Reed; and, if yea, where and at what time?"

A. "I did not order the accounts to be made out in the name of Davis & Associates instead of Davis, Sprague & Co., so far as they related

208 to the contract for one million, but I did, so far as related to ties furnished by Davis in excess of the first or million-tie contract. I don't recollect the time, except that it was after the time that Mr. Reed had been transferred, as general superintendent of construction, from the division of the road in which Davis, Sprague & Co. were delivering ties, and placed in charge of the division west of that, on which the million ties were to be used, which was subsequent to June 1st, 1868. I do not recollect at what place I gave such instructions."

M. B. Sprague had not delivered ties in company with others to what is known as the million-tie contract.

He had been in the million-tie contract.

He had been in the employ of the company, or the contractors, as agent, with a salary, to look after the tie and timber department from the commencement of building the road, but not as a contractor.

His relations with the company, as an employee, ceased when he took an interest in the million-tie contract.

Many parties sold the company ties previous to that time, probably to the amount of two millions.

Q. "Do you know whether or not there was in use by said tie contractors a set of printed blanks, in the form of orders on their paymasters, requesting them to pay certain blank amounts to certain blank individuals, which said blank would be filled in with dollars and cents and the name of the payee and which would be paid by the U. P. R. R. Co. and attached to their vouchers, and charged up to said tie contractors? If yea, describe them."

A. "Davis, Sprague & Co. had blanks, but not having one before me I cannot describe them accurately. The firm name of Davis, Sprague & Co. was printed on them, and the company, or rather the trustees, paid the orders when signed by Davis, Sprague & Co. accompanied with the proper vouchers, and the same were charged to their account."

S. B. Reed was the general superintendent of construction at the time of making the million-tie contract. He had general charge. In the spring of 1868, and shortly after Davis, Sprague & Co. had commenced delivering ties, the railroad company determined to complete, as rapidly as possible, their road, and commenced to make arrangements for the grading, ironing, and furnishing of ties west of that portion of the road which was provided for in the million-tie contract. It was thought that two or three hundred miles of road was as much as any one engineer could efficiently take the supervision of. Mr. Reed was therefore sent to take charge of the western division, and Mr. Evans was placed in charge of the division
209 Mr. Reed left, in which division was included Fort Saunders, the headquarters of Davis, Sprague & Co. and in which the million ties were to be used.

This change was in the latter part of May or in June, 1868, at which time Mr. Reed ceased to have the said tie contract under his charge.

J. W. Davis, with his associates, established an office and their headquarters at Piedmont, or Tie Siding. Their work being in Mr. Reed's new division, instructions would be given him in reference to the ties, without any regard to the million-tie contract on the eastern division, as each of these engineers were made general superintendents of their respective divisions.

The deposition of HENRY J. ROGERS, taken at Appleton, Wisconsin, before G. T. Thorn, as commissioner, on the 24th of September, 1877, who testified as follows:

I have known Posey S. Wilson about nine years. I never said to him in Cheyenne, in the winter of 1868 or 1869, or at any other time or place, that Davis, Sprague & Co. and James W. Davis & Associates were different firms, and that one could not be held for the other, and that they were distinct.

I never, in the spring of 1869, at my banking house at Cheyenne, or at any other place or time, said to Wilson that Davis & Sprague's paper

was better than that of Davis & Associates, or anything equivalent thereto. I never, in the spring of 1869, or at any time, in speaking of the firm of Davis, Sprague & Co. and James W. Davis & Associates, said to Posey S. Wilson, or in his hearing, that claims against one of said firms was not good against the other.

Cross-examination:

Q. "State what person or persons, and give the names of each of them, to whom you spoke of the firms of Davis, Sprague & Co. and James W. Davis & Associates in the spring of 1869?"

A. "I have spoken to hundreds of persons about James W. Davis & Associates, but cannot now give their names."

I don't remember how many conversations I had with Posey S. Wilson in the spring of 1869.

In relation to James W. Davis, I never had any conversations with him in which James W. Davis' name was used.

210 I lived in the house in Cheyenne, which I stated in my case in chief in this suit belonged to me in Cheyenne, and in which the said books of account of H. J. Rogers and H. J. Rogers & Co. are now situated, from the latter part of 1868 until the spring of 1873.

I have sold the house but not the books.

The building in which I left the books is situated on 17th street, in the city of Cheyenne. It is a one and a half story house, nearly square, painted brown. It is known as the old "Whitehead house."

I don't know where the books are now.

My attorney told me about ten days ago, in Chicago, what Wilson had sworn to, and asked me if his statements were true. I told him no. He said he should want my testimony in rebuttal.

LUCIUS HOYT, of the city of Chicago, produced as a witness on behalf of said complainant, on the 26th day of September, A. D. 1877, testified as follows:

I first went to Cheyenne in the month of December, 1869, and left there about May 1st, 1871.

I was in the banking house of Rogers & Co., and knew P. S. Wilson, C. D. Sherman, and H. J. Rogers.

I don't recollect hearing any conversation in the winter of '68–'9, in the banking house of Rogers & Co., in Cheyenne, between Sherman and Wilson, in which the former stated that Davis, Sprague & Co. and Davis & Associates were different firms, and that one could not be held for the other, or anything equivalent thereto, nor did I, at any other time or place, hear such conversation.

Q. "Did you ever hear Mr. Harry Rogers, the plaintiff in this case, make any such expressions, or equivalent ones?

A. "I don't remember any such; but, as I understood it——

Q. "No matter; I don't want anything more."

Cross-examination:

Rogers' partner in Cheyenne was Sherman.

I have no recollection of ever hearing Sherman or Rogers speak of the difference between the two firms.

I may have heard it, but I don't recollect it.

211 Both kinds of their paper were not in circulation as late as the time I went there, though there was some of both firms in existence.

There was some paper in the bank in which one of the firms was interested.

I can't say whether both, or which.

I don't recollect of any sales of the paper of either of those firms after I went there.

Wilson was frequently in the bank of Rogers & Co., in the ordinary course of business, may be once a week. He was a private banker there.

About the sum and substance that I can swear to positively is that I don't remember such conversations as I was asked about on direct examination, but I think there was some of the paper of one or both of these firms in Rogers & Co.'s bank, and that the paper of both those firms had been on the market before that time, but was not then readily negotiable.

I don't know what was in circulation before I went there, except by seeing the entries on the books.

I supposed that the paper had been negotiable.

Redirect examination:

I can't separate the two firms. All I know is Davis & Associates.

HENRY MORROW, being produced as a witness on behalf of the defendant, William F. Durant, at Iowa City, on the 16th of October, 1877, testified as follows:

I am 52 years of age; reside in Iowa City; and agent for the Chicago, Clinton & Western Railway Company. I know Rogers, Davis, and Durant, and have known them since 1868, or before.

Between 1867 and 1870 I had charge of the warehouses belonging to the U. P. R. R. Co., or trustees for building the same, in which was stored all supplies for the use of subcontractors and others.

Nearly all freights going to subcontractors went through these warehouses. Articles were sent overland to the contractors and others, and I superintended the loading and transportation of the same.

This superintendence of mine was from the spring of 1868 to
212 the time the road was completed. These supplies were hay, food, and all kinds of groceries, and everything pertaining to camp and frontier life.

I knew of a firm of Davis, Sprague & Co., and also of a concern called J. W. Davis and Associates.

Davis, Sprague & Co. got out a million ties and some lumber for the road, and afterwards J. W. Davis and Associates got out other ties. That was the business of the two firms.

In my connection with said supply warehouses and that department a great many supplies and great amounts of freight were received and sent along by me to Davis, Sprague & Co. This, I should say, until the fall of 1868, and afterwards a great many went to said warehouse and were sent to J. W. Davis and Associates.

I saw all of these articles and checked them off when loaded, and filled requisitions from each of said firms for supplies which our department furnished—such as groceries, hay, grain, &c.

Davis, Sprague & Co. ordered supplies from our department. They were

furnished by me as agent of said trustees to them (D., S. & Co.), and forwarded to such firm and charged to said Davis, Sprague & Co. on the books we kept.

Afterwards Davis and Associates ordered supplies, and as these were furnished they were charged to J. W. Davis and Associates on the books. The accounts and transactions of the firms were kept separate on the books. The dealings of Davis, Sprague & Co. were continued until the fall of 1878—whenever they finished their million-tie contract; then the dealings with Davis and Associates began, and continued until the road was finished. In our department supplies were ordered by each firm, and charged to the firm ordering the same.

The goods sold or furnished to Davis, Sprague & Co., as above stated, were all charged to Davis, Sprague & Co. They were all shipped to that firm at various points.

Cross-examination:

The two firms referred to in my direct examination, and which you now ask about, were not different names for the same concern, and it did not conduct the same business under two different names, as I understand it. The first firm was Davis, Sprague & Co., who had the million-tie contract. The firm of Davis and Associates got out other ties after Davis, Sprague & Co. got through.

I know Mr. S. B. Reed. His evidence is reliable, and entitled
213 to credit. I did not suppose that Mr. Reed knew anything, personally, about supplies furnished tie contractors, or their accounts thereof.

I would know better than Mr. Reed about the supplies, because they passed through my hands and I had the necessary charges made in our books.

Mr. Reed was superintendent of construction, but more especially attended to duty at the work west of the work done by Davis, Sprague & Co., and was not in the vicinity of these warehouses, and he paid no personal attention to them.

I would know better than Mr. Reed to whom supplies were furnished and charged and to whom shipped. If Mr. Reed should say that the accounts of some tie contractors were kept with Davis & Associates he would be correct. If he did so state as to all or other tie contractors, he would be mistaken.

I was not employed in the office of S. B. Reed, nor under him, as I understood it. Mr. Reed was superintendent of construction of the road. I was sent up to this duty by the general superintendent, not Mr. Reed. Mr. Reed had no oversight or nothing to do with my said business.

If Mr. Reed should state that goods were shipped to the men who furnished ties to the Union Pacific Railroad in the name of Davis & Associates, I should not consider his statement upon the question more reliable than my memory. I know and remember what I did.

It was not the general belief or reputation in the country, nor among the business men resident in the neighborhood where the Union Pacific Railroad was being built, that Davis, Sprague & Co. and Davis & Associates were convertible terms for the same association.

On the other hand, it was well known that Davis, Sprague & Co. had

the million-tie contract, and the business pertaining to it was done in that name.

When that contract was about completed, the name of Davis & Associates appeared, and it was well understood along the line that this change of name meant a change in business, and in make up, and in membership of firm.

Cross-examination of C. D. Sherman, on the 8th day of December, A. D. 1877, pursuant to stipulation.

Shortly after I went to Cheyenne and opened a bank for Kountze
214 Brothers & Co., B. F. Bunker came and opened an account in the name of "B. F. Bunker, cashier."

The paper which you show me looks some like Christopher's writing to me. I haven't seen Christopher's writing in eight years at least. I wouldn't be apt to recognize it.

The note for $5,000, dated Cheyenne, April 13, 1868, payable to the order of John Tiernan, at 60 days, at the First National Bank of Omaha, is signed in J. W. Davis' handwriting. The last endorsement on the back is in my handwriting.

Said note offered as Exhibit 1 to Sherman's deposition.

Here is a draft dated Cheyenne, May 9, 1868, for $1,000, at 60 days, in favor of the makers, who are McDonald and Henry. There is nothing on it to show that it went through Kountze Brothers' bank, except their endorsements to them.

That looks like Bunker's acceptance on the face of it, like his handwriting, as I remember it.

(Said paper is offered in evidence as Exhibit 2.)

Redirect examination:

Counsel for William F. Durant objects to any further cross-examination of the witness by Mr. Whitney, as he has already stated that he had nothing more to ask him and the deposition was closed, and he is now called without notice or stipulation.

I remember going to New York in company with Pierson S. Mattox, last October, I think, October, 1876.

I didn't appear as a witness in the trial of Christopher against Kountze and others.

I did not inform Mattox, to my recollection, on the trip, or at New York on that occasion, anything that I was going to swear, or had sworn in that case.

215 EXHIBIT 1.

$5,000.] CHEYENNE, *Ap'l* 13, 1868.

Sixty days after date we promise to pay to the order of John Tiernan five thousand dollars, at First Nat. Bank, Omaha. Value received. Coll. stamps.

DAVIS, SPRAGUE & CO.,
By JAS. W. DAVIS.

No. 8462. Due June 12–15.

[U. S. 2.50. Inter. rev. stamp.]

(Endorsed across face:) Paid Mattox. Ent'd.

(Endorsed on back:) No. 12. $5,000.00. J. Tiernan & Co., acc't m'dse. June, 1868. John Tiernan. Rec'd. Kountze Bros. & Co., Sherman.

EXHIBIT 2.

$1,000.] CHEYENNE, *May 9th*, 1868.

Sixty days after date pay to the order of ourselves one thousand dollars, value received, and charge to account of

Yours, &c.,

McDONALD & HENRY,
C. A. H.

To Mess. DAVIS, SPRAGUE & Co.,
Ft. Saunders, D. T.

No. .]

[Charles McDonald, May 29, 1868. Cheyenne.]

(Endorsed across face:)

Accepted.

DAVIS, SPRAGUE & CO.,
BENJ. F. BUNKER, *Cash.*

Paid July 9, '68.

216 (Endorsed on back:) $1,000,00. M'dse acc't. McDonald & Henry, df't. paid July 9, '68. McDonald & Henry. C. A. H., S. N. Portufula, pay Kountze Bro. M. H. Deming.

[50 c. int. rev. stamp. McDonald & Henry, May 9th, '68.]

217 SCHEDULE A.

COZZENS HOTEL, OMAHA, *Nov. 19th*, 1867.

S. B. REED, *Sup't. &c., or Committee:*

SIR: On behalf of myself and associates, I propose to furnish your company with ties, as follows: 100,000 to be delivered on the line of road in the vicinity of Ft. Saunders at 70c. each (50,000 of above, if that amount can be obtained in cañons of Black Hills, at 65c. each; 100,000 on line of road at or near the Big Laramie River, at 70c. each; 200,000 on line of road at or near the Big or Little Laramie River, to wit: 100,000 at 75c. each, and 100,000 at 80c. each; 600,000 on line of road at Little Laramie River, North Platte River, or intermediate points to wit: 300,000 at 90c. each, and 300,000 at 95c. each.

If prices are satisfactory, the details of contracts, time of delivery, &c., can be arranged at once, and if required, security will be given for its performance, to the amouut of $100,000. If this is accepted, we will purchase the present outfit of the company now at Saunders, and assume the payment for the ties.

We will also purchase the saw mill at a fair price, and furnish all lumber it will cut for the next twelve months (if required), delivered on line of road, at forty-two dollars per thousand feet.

We will also furnish such timber as may be required at Dale Creek Bridge, say: Three hundred thousand (300,000) feet at $40 per M., and 300,000 feet at $45 per M.

It is understood that the arrangements in regard to transportation of men and outfits shall be the same as in former contracts, and that we shall have exclusive right to the timber.

JAMES W. DAVIS,
For Self, Sprague, and Others.

P. S.—Will furnish hewed timber, 25 feet in length and under, delivered at a convenient point, west of Saunders, for forty dollars per M.

JAMES. W. DAVIS,
For Self and Associates.

Outfit shall be construed to mean wagons, teams, harness, and men, and does not include provisions, hay, feed, or groceries.

218 SCHEDULE B.

OMAHA, NEB., *Nov. 20th*, 1867.

To J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Your proposition to furnish this company with ties and timber, delivered at different points on the line of road, and dated November 19th, 1867, is accepted, and a contract will be drawn up embracing details, conditions, specifications, and explanations not sufficiently set forth in the proposition, substantially, as follows:

1st CONDITION.—The ties are to be delivered at the several points in such quantities as will furnish the road, westward, to the next point where ties are delivered, or beyond; the object being simply to prevent the hauling of ties by the railroad company, eastward, and to fill up any deficiency.

2d CONDITION.—The term outfit, when the same is used in the clause relating to the transportation by the company over their line, shall be construed to mean men, tools, and teams.

3d. All expenses of outfit (as per bills) pertaining either to the ties now being cut at Laramie River, or the saw-mill, at this point or other places, when the same are used or incurred in the performance of that portion of work assumed by contractors, including cost of houses at Fort Saunders, shall be charged to them at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

The price of saw-mill to be fixed at $3,500; you to take two or four of the mules and wagons intended for Dale Creek at cost.

4th. The railroad company reserves the right to deduct from the number of ties proposed to be delivered at Fort Saunders, and in the vicinity, and intended to be procured from the places in the Black Hills and viciniy, where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as this committee may agree upon as a compromise with the said parties; and nothing in this contract relative to the exclusive right of timber shall interfere with said committee giving consent to the procuring of such amount as may be agreed upon at these points to affect that compromise.

The company to charge the contractors and deduct from the estimate

the cost up to the present time of labor on ties, saw-mill, and cost of hauling.

Payments to be made on monthly estimates, as ties are delivered; and in case the contractors haul them a portion of the distance and pile
219 them up for inspection, to be delivered on road in spring, a fair estimate shall be made, and payments made thereon; but no payments shall be made on ties simply cut and laying in the woods and hewed; but all ties shall be at the risk of contractors until delivered on line of road.

It is understood that timber shall be got out according to bill. The contractors may go on with the work if they consent to the above; but the contract, after being drawn, shall be sent to New York, to be approved and executed.

(Signed) SIDNEY DILLON,
T. C. DURANT,
Committee.

Approved at meeting of trustees, Dec. 3, 1867.
H. C. CRANE, *Secretary.*

SCHEDULE C.

(Copy of contract.)

J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Referring to your proposition of 19th November, and its acceptance, November 20, 1867, by committee, and approval of trustees, December 3, 1867, I have framed the following contract, to wit:

Memorandum of agreement, made and entered into this 3d day of December, 1867, by and between J. W. Davis, for himself and others, the party of the first part, and H. C. Crane, secretary of the trustees, of the second part, witnesseth: That for and in consideration of the stipulations and agreements hereinafter set forth, the parties of the first part agree to deliver to the parties of the second part railroad ties, in and after the following manner, to wit: 100,000 ties, to be delivered on the line of railroad of the Union Pacific Railroad Company, in the vicinity of Fort Saunders, at 70c. each (50,000 of the above, if that amount can be obtained in cañons of the Black Hills, at 65c. each); 100,000 ties, at or near the Big Laramie River, at 70c. each; 200,000 ties, on line of road, at or near the Big or Little Laramie River, to wit: 100,000 at 75c. each, and 100,000 at 80c. each; 600,000 on the line of road, at Little Laramie River, North Black River, or intermediate points, to wit: 300,000 at 90c. each, and 300,000 at 95c. each; all of the above to be of the size required by the specification of the engineer in charge of construction, and to be delivered as fast as may be required by the party of the second part in course of construction of the road.

220 The parties of the first part also agree to purchase the outfit of the company, now at Saunders, and assume the payment for the ties at that point. Also, to purchase the saw-mill for the sum of $3,500, and to furnish all lumber it will cut for the next twelve (12) months (if required so to do), and deliver the same on line of road, at forty-five ($45) dollars per M.

The parties of the first part also agree to furnish such timber as may be required at Dale Creek bridge, say 300,000 feet, at forty (40) dollars per M, and 300,000 feet at forty-five (45) dollars per M; and will also deliver hewn timber, twenty-five (25) feet and under in length, at convenient points west of Saunders, at forty (40) dollars per M.

All expenses of outfit, as per bill, pertaining either to the ties now being cut at Laramie River or the saw-mill at Little Laramie, or at other places where the same are used, or incurred in the performance of that portion of the work assumed by contractors, including cost of house at Saunders, shall be charged the parties of the first part at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

In transportation the term outfit shall be construed to mean wagons, harness, teams, and men, and does not include hay, feed, or groceries.

Payments made by the company for labor on ties, prior to the assumption of the parties of the first part to pay for the same, shall be deducted from the first estimate, and for the saw-mill and other outfit, including house, from the second and third estimate.

Equal amounts from each payment to be made monthly, on estimate of the engineer in charge of construction, as ties are delivered; and in case the parties of the first part haul them a part of the distance and pile them up for inspection, in piles of not less than one thousand (1,000), to be delivered on road in spring, a fair estimate shall be made and payments made thereon, but no payments shall be made on ties simply cut and lying in the woods and hewed, but all ties shall be at risk of parties of the first part until delivered on line of road.

It is also understood that timber shall be got out according to bill.

The parties of the second part reserve the right to deduct from the number of ties proposed to be delivered at Ft. Saunders and in the vicinity, and intended to be procured from the places, in the Black Hills and vicinity, where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as the trustees may agree upon on a compromise with the said parties, and nothing in this contract relative to the exclusive right of timber shall interfere with said parties of the second part giving consent to the procuring of such amounts as may be agreed upon at the points to affect that compromise.

221

It is understood that the ties are to be delivered at the several points in such quantities as will furnish the road westward to the next point where ties are delivered, or beyond, the object being simply to prevent the hauling of ties by the railroad company eastward to fill up any deficiencies. In making the payments on estimates for the ties delivered on the line of road at the several points provided for, twenty (20) per cent. shall be reserved on each lot as designated by the several prices herein named, but in no case shall the said reservation be more than fifty thousand (50,000) dollars.

In witness whereof the parties have signed and sealed these presents.

H. C. CRANE,
Secretary for Trustees.
J. W. DAVIS,
For Self and Associates.

222 Indictment of complainant, Rogers, presented by the grand jury

of the United States of America, in the first district of the Territory of Wyoming, finds that "Henry J. Rogers, yeoman, late of the district aforesaid, and in the district aforesaid, and within the jurisdiction of this court, then and there being cashier of the First National Bank of Cheyenne, a banking association organized and acting under and by virtue of the laws of the United States, then and there, feloniously, fraudulently, unlawfully, and willfully, did embezzle, abstract, and misapply moneys, funds, and credits of said national banking association, to the amount of $40,000, and of the value of $40,000, with intent then and thereby to injure and defraud said banking association."

Witnesses mentioned on the indictment: Posey S. Wilson, J. W. Iliff, M. A. Arnold.

Indictment of Isaac W. French, by the grand jury of the first judicial district of the Territory of Wyoming, finds that on the 28th of August, 1874, Samuel H. Windsor was registrar in the land office of the United States at Cheyenne, for the Territory of Wyoming, and George W. Corey was receiver of public moneys for said district.

That said registrar and receiver had, then and there, pending before them a certain question, known as the "Alma coal contest," in which the Rocky Mountain Coal and Iron Company, the Wyoming Coal and Mining Company, and William Hinton were contestants, concerning the rights of each of the said contestants, respectively, to enter and purchase from the United States a certain parcel or tract of the public coal lands of the United States; that it was the duty of said Windsor and Corey, in their official capacity, to determine and decide as to the rights of said contestants, respectively, to enter and purchase said land.

That Isaac W. French, on said day, well knowing the premises, did, unlawfully, willfully, wickedly, and corruptly, devising, contriving, and intending to tempt, seduce, bribe, corrupt, and influence the decision and action of the said Samuel H. Windsor and George W. Corey, so being officers, &c., and, as such, engaged in inquiring into the rights of the contestants in said contest, to induce them to violate their lawful duty in the premises, did, wickedly, unlawfully, and corruptly, promise, and offer to said Samuel H. Windsor and George W. Corey a large sum of money, to wit, the sum of one thousand dollars, in order thereby corruptly to influence, induce, persuade, and bribe them, the said Samuel H. Windsor and George W. Corey, in their character and capacity of registrar and receiver, as aforesaid, to decide said "Alma coal contest" in favor of the said Rocky Mountain Coal and Iron Company, &c.

223 CHICAGO, *Dec.* 21*st*, 1877.

TO A. A. ROWLEY:

On the 30th day of October, 1876, my deposition was taken before you in the case of Hurlburt v. Richards and others, pending in the United States circuit court in and for the northern district of Illinois, and by stipulation said deposition was to be used in the case of H. J. Rogers v. W. F. Durant and others, pending in the same court. The deposition was taken by a shorthand reporter, Mr. James F. Meagher, and as it has not been filed, and not having had an opportunity to revise it after it was written out, nor having seen it until to-day, I ask you now to make, or cause to be made, the following corrections in said deposition:

In answer to cross-question No. 3 I am made to say as follows:

"Well, they were made out, most of them, in the name of Davis, Sprague & Co.—some of them in the name of Davis & Associates."

I should have stated, and supposed I did, that the time checks made at the time inquired about were made out in the name of Davis, Sprague & Co.

In answer to cross-question No. 56 I am made to say as follows:

"No, sir; it was drawn through me. All the money due Davis, Sprague & Co. was drawn by me, and paid out on drafts of Davis & Associates."

I should have stated, and supposed I had—

"The trustees of the road paid me, as cashier of Davis, Sprague & Co., the balance due Davis, Sprague & Co. in settlement of the million-tie contract, as agreed upon by Mr. Evans and myself."

In answer to cross-question No. 57 I am made to say:

"I don't suppose they knew where the money was going. I don't know as they knew where it went to. They paid it to me, all that was due."

I should have said, and supposed I did—

"No, sir; they did not."

Respectfully,

PIERSON S. MATTOX.

(Indorsed:) Term No. . Agenda No. . United States of America, northern district of Illinois, in the circuit court thereof. In chancery. Henry J. Rogers, complainant, vs. William F. Durant, impleaded with James W. Davis et. al., defendant. Abstract of case. Filed , , clerk. Lawrence, Campbell & Lawrence, solicitors for defendant.

224 Supreme court, county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, Pierson S. Mattox, *against* JAMES W. DAVIS ET AL.

CITY AND COUNTY OF NEW YORK, *ss:*

Cornelius Christopher, being duly sworn, doth say that the above-entitled action is brought by the above plaintiffs as partners of an alleged firm of Davis, Sprague and Co. against James W. Davis, James H. Gessner, and others, alleged partners of said alleged firm, and against said Davis and said Gessner and others, as partners in another alleged firm of J. W. Davis and Associates, and against Thomas C. Durant and others, trustees, and the wife of said Davis as defendants; the complaint alleging that said firm of Davis, Sprague and Co., about November and December, 1867, made a contract to supply said trustees with lumber, ties, and other property, which was mutually performed, and a large amount of money received by said Davis from said trustees on that account, which said money
225 was invested by said Davis wrongfully in another contract of a similar nature with said trustees made in behalf of said other firm of Davis and Associates which has been performed to the extent that said trustees are owing therein a large amount of money.

And that said Davis took of the partnership funds of said Davis, Sprague and Company, and has invested the same in the name of his said wife, and that Davis is insolvent and a non-resident.

And that the plaintiffs sue for their own benefit, and of all creditors who may hereafter unite in this action, or be made parties thereto, and demands that both said firms be dissolved; that a receiver be appointed and an accounting be had between said two alleged firms, and a determination of the rights of all parties in the premises, and that the firm of Davis, Sprague & Company be adjudged a creditor of the firm of Davis and Associates with a lien on said assets, prior to all other creditors, and for further relief to plaintiffs, and such other parties as shall show their interest and unite in this action.

Deponent further says, that a referee has been appointed in this action; that an order has also been made herein that all persons having
226 claims against either of said firms prove the same before said referee, within twenty days after service, personally or at their residence, or by publication of notice of said order.

That all creditors whose claims are not so presented, be excluded from participation in said fund; that said pass upon and determine the validity of said claims; that this deponent appeared with his counsel, H. Brodhead, esq., before said referee and gave proof of a claim on deponent's behalf of $11,225.30 against the parties contracting with said trustees, which claim has been allowed by said referee; both plaintiff and defendant being represented by counsel and put in evidence in opposition to deponent's said claim before said referee; that said referee made a report containing among other things, an allowance of deponent's claim about the 4th day of May, 1871, and delivered same to plaintiffs' attorney; that subsequently new evidence was presented to said referee, whereupon about the 16th day of August last, said referee signed another report of a different tenor in place of said first report, but said second report was not delivered, but about the 26th day of September last, said referee made another report and delivered the same to said plaintiffs' attorney; that as deponent believes there were no orders of court directing said new reports,
227 but the said matters were reconsidered by said referee and new reports made at the request of and by stipulation between the plaintiffs and defendants herein; that no report has ever been filed, but deponent says that deponent was the cashier and had charge of the books of the parties interested in said contracts and funds and knows and says that there was but one partnership and firm interested therein; that defendants Davis, Gessner, Richards, and Ruth, and one Train, and the plaintiffs Durant and Sprague, were the members of the one and only partnership existing in the premises, and that the allowance of a pretended claim of a part of said firm as plaintiffs against another portion of said firm as defendants as creditors of the latter, and against the fund in court, will deprive deponent of his first claim as a creditor, and deponent is informed and believes that further stipulations are about to be made between plaintiffs and defendants with the purpose and intention of having a report filed by said referee allowing a claim of said plaintiffs as creditors against said defendants and against said fund pro rata with deponent and other creditors, and in fraud of the latter; and deponent says that said plaintiffs and said partnerships are justly indebted up to the time of put-

228 ting in said proofs before said referee to the extent of eleven thousand two hundred and twenty-five dollars and thirty cents, and deponent next says he fears he has no way of protecting his interest in said fund and in the evidence, except to be made a party thereto and be represented by his attorney therein.

C. CHRISTOPHER.

Sworn before me this 24th day of October, 1871.

ROBERT OWEN,
Notary Public, N. Y.

Supreme court, county of New York.

W. F. DURANT AND OTHERS
against
JAMES W. DAVIS AND OTHERS.

On the annexed affidavit of Cornelius Christopher, let the plaintiffs or other parties to this action, or their attorney, shew cause before me or other justice of this court holding the chambers thereof at the court-house in the city of New York, at 11 o'clock in the forenoon of the first Monday of November, 1871, why said Christopher should not be added as a party defendant in the above-entitled action, and have such other or further relief as may be just, and let all proceedings in this action by plaintiffs or
229 defendants be stayed until the hearing of the application except as to proceedings before the referee herein.

October 25, 1871.

D. P. INGRAHAM, [SEAL.]

(Endorsed:)

Due service of the within affidavit and order hereby admitted. Oct'r 25, 1876.

J. M. WOOLWORTH,
Att'y for Davis and Gessner,
P'r D. W. G.
CLARK BELL,
Pl'ff's Att'y.
HAMMOND AND POMEROY,
Att'y for Dillion and Others.

230 EXHIBIT A.

231 Supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE and PIERSON S. MATTOX, plaintiffs.
against
JAMES W. DAVIS ET AL., DEFENDANTS.

Copy summons, complaint, affidavits, injunction, and order appointing a receiver.

Clark Bell, plaintiffs' attorney, 20 Nassau street, N. Y.

New York: Russells' American Steam Printing House, Nos. 17, 19, 21, 23 Rose street. 1873.

232 N. Y. supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
ag'st
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, John Doe, Richard Roe, and Susan Doe, composing, with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, as copartners, composing the firm of J. W. Davis and Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, and Elizabeth Davis, wife of James W. Davis, defendants.

To the above named defendants:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 20 Nassau street, in the city of New York, within twenty days after
233 the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated September 26, 1870.

CLARK BELL,
Plaintiff's Attorney.

New York supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
ag'st
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, John Doe, Richard Roe, and Susan Doe, composing, with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, as copartners, composing the firm of J. W. Davis and Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, and Elizabeth Davis, wife of James W. Davis, defendants.

The plaintiffs complain of the defendants and say:
234 That the plaintiffs and the defendants James W. Davis, James

H. Gessner, Timothy P. Richards, William Ruth, John Doe, Richard Roe, and Susan Doe were and are copartners, doing business as such under the firm name and style of Davis, Sprague & Company.

That heretofore, to wit, on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant James W. Davis, acting for himself and the said above named parties so comprising the said firm of Davis, Sprague & Company, as aforesaid, of the first part, at the city of New York, made a contract with the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, parties of the second part, for the delivery by the said James W. Davis and his associates, so comprising the firm of Davis, Sprague & Company, unto the said parties of the second part of a large quantity of railway ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices and upon certain terms and conditions, as will more fully appear by the memorandum of said contract, of which copies are hereunto annexed, marked Schedules A, B, and C, and which are referred to and to be taken as a part of this complaint.

That the business of the firm of Davis, Sprague & Co. referred to the work, and labor, and material, to be done, used, and furnished in the performance by the party of the *the* first part of the said contract, so made as aforesaid, and so contained in Schedules A, B, and C, hereunto annexed.

That the interest of the respective parties in said contract were divided among the respective parties, members of the said firm of Davis, Sprague & Co., as follows: To Pierson S. Mattox, one-tenth interest; Mordecai B. Sprague, one-tenth; William F. Durant, three-tenths; Timothy P. Richards, one-tenth; William Ruth, one-twentieth; James F. Gessner, one-twentieth; James W. Davis, one-tenth; John Doe, one-twentieth,
235 or thereabouts; Richard Roe, one-twentieth, or thereabouts; Susan Doe, one-tenth, or thereabouts.

That the precise amount of interests of the said defendants John Doe and Richard Roe and Susan Doe are unknown to the plaintiffs, but the same are as alleged, as plaintiffs are informed and believe.

That the real names of the said partners John Doe, Richard Roe, and Susan Doe are unknown to these plaintiffs, or the nature or character of their exact interest in the same, but the plaintiffs allege that certain persons unknown to them were interested in the said contract for the remaining two-tenths interest, which plaintiffs allege, upon information and belief, were held and owned as above alleged, and plaintiffs sue them in the name of John Doe, Richard Roe, and Susan Doe, as aforesaid, and some or one of them was so interested therein.

That the said parties composing the firm of Davis, Sprague & Company and the said firm of Davis, Sprague & Company, so composed as aforesaid, duly performed the said contract on their part, and full and duly delivered unto the said trustees, parties of the second part, all the ties, lumber, and timber therein by them agreed to be delivered, and in all other respects, and the same was fully accepted by the said trustees, parties of the second part, as fully performed in all respects, and the business of the firm completed and terminated.

That under the same the said firm of Davis, Sprague & Co., and the parties so composing the same, became entitled to receive large sums of

money from the said trustees, as specified in the said contracts, Schedules A, B, and C.

That the defendant James W. Davis has received large sums of money from the said seven trustees aforesaid, and from other sources, the
236 avails and profits of the said contract so done and performed as aforesaid by Davis, Sprague & Company, to wit, the sum of two hundred and twenty-five thousand dollars and upwards, and that he neglects and refuses to divide or distribute it among his said copartners so composing the said firm of Davis, Sprague & Company, as aforesaid.

That without the knowledge, privity, or assent, or concurrence of the plaintiffs, the said James W. Davis wrongfully took the funds and profits of the said firm of Davis, Sprague & Company, and so received by him from the seven trustees for work and labor and materials furnished under said contract specified in Schedules A, B and C, and also assets and materials then on hand belonging to said firm, and invested the same, to wit, the sum of two hundred thousand dollars and upwards, in another and a new contract or contracts with the said seven trustees for the further delivery of ties, lumber, &c., on certain terms, prices, and conditions which are unknown to these plaintiffs, in and for the benefit of a new and other firm, to wit, a firm known by the name of J. W. Davis and Associates, and composed of the said James W. Davis, the defendant James H. Gessner, and certain other persons who are wholly unknown to these plaintiffs, but whose names, as these plaintiffs are informed and believe, and hereby charge, and by which names he joins them as defendants, are John Brown, and William Brown, and Sarah Brown, but the respective rights and interests of which are wholly unknown to these plaintiffs.

That the said defendant James W. Davis so organized the said new firm of James W. Davis and Associates as aforesaid, and so invested in the said new contract or contracts so made with the said seven trustees the funds of the said firm of Davis, Sprague & Co.

And that neither the plaintiff herein nor the other above-named members of the firm of Davis, Sprague & Company are members of the said new firm so organized of J. W. Davis and Associates, or in any wise interested in the said new contract or contracts so made with the said seven
237 trustees as aforesaid, as partners or participants in the profits or benefits thereof.

That the said firm, so composed, as aforesaid, of J. W. Davis and Associates duly performed the said contract or contracts, and became entitled to receive, and claim now to be entitled to receive, from the said seven trustees a large sum of money, to wit, the sum of three hundred thousand dollars and upwards.

That the said seven trustees, defendants as aforesaid, are justly indebted unto the above-named plaintiffs and the firm so composed of Davis, Sprague & Company, for the labor done and performed, and materials, &c., furnished as aforesaid, in a very large sum, to wit, in the sum of three hundred thousand dollars and upwards.

That all of the money due or remaining unpaid by the said Thomas C. Durant, Oliver Ames, and others, trustees as aforesaid, unto the said J. W. Davis and Associates, under the said new contract or contracts, in truth and in fact, both in law and equity, belongs to the said firm of Davis, Sprague & Company; and the said trustees are indebted to these plaintiffs

and the said firm therefor in the sum of three hundred thousand dollars, or thereabouts or upwards.

That said James W. Davis further wrongfully, and without the knowledge, consent, or concurrence of the plaintiff or of his copartners, took of the partnership funds and assets of the said firm of Davis, Sprague & Company, and so by him received from and under the said contracts, a large sum of money, to wit, the sum of thirty-five thousand dollars, and has wrongfully invested the same in his own name, or in the name of his wife, Elizabeth Davis, for his private use and benefit.

That the said James W. Davis is insolvent, and is a non-resident of the State of New York; that he resides in Omaha, Nebraska; that he is now wasting and squandering the property and assets of the said firm of
238 Davis, Sprague & Company and of the said firm of J. W. Davis and Associates, and that he has already wasted and squandered large sums of money, &c., the property of both and each of said firms.

That the plaintiffs bring this action for their own benefit, as well as for the benefit of all those who shall hereafter unite as parties to this action, contribute to the expenses of the same, and who may be entitled to become parties hereto, and for the benefit of all creditors who may hereafter unite in this action or be made parties hereto. Wherefore the plaintiff demands the judgment of this court:

1. That the partnership known as Davis, Sprague & Company be adjudged and declared to be dissolved and terminated, as well as the firm of J. W. Davis and Associates; that an accounting be had of the partnership business and assets, as well of the firm of Davis, Sprague & Company as of the said firm of J. W. Davis and Associates, and that a distribution of the firm property and assets be made of each of said firms among the respective parties in interest as the same shall appear.

2. That a receiver be appointed herein, pending the hearing and the determination of this action, of the property and assets of the said firm of Davis, Sprague & Company, with the full and usual powers of receivers in such cases.

3. That said receiver be directed to receive, sue for, and collect, and hold subject to the order of this court, besides the said assets of the firm of Davis, Sprague & Company, all the assets, property, and effects of said firm of J. W. Davis and Associates, and all sums due either of said firms from the said seven trustees, and from all other sources; also, all money, property, real and personal, standing in the name of James W. Davis or his wife, Elizabeth Davis.

4. That the respective rights and interests of all the parties in the premises be fully adjusted, liquidated, determined, and settled between
239 all the parties, and an accounting had of all the business of both said firms; that an accounting be had between the firm of Davis, Sprague & Company and the said seven trustees, and between the said firm of J. W. Davis and Associates and the said seven trustees, and the respective rights settled between the said firms and parties; that an accounting be had between the firm of Davis, Sprague & Company and the said seven trustees, and between the said firm of J. W. Davis and Associates and the said seven trustees, and the respective rights settled between the said firms and parties.

5. That the amount due and owing by the said seven trustees may be ad-

judged and decreed to belong to and be the property of Davis, Sprague & Company, or that the said firm of Davis, Sprague & Company may be adjudged to be the creditors of the said firm of J. W. Davis and Associates, and be entitled to all the benefits and privileges of creditors, with a lien upon the said assets prior to the other creditors of that firm.

6. That the said Thomas C. Durant, Oliver Ames, Cornelius S. Bushnell, Sidney Dillon, John Duff, Henry S. McComb, and Benjamin E. Bates be ordered, adjudged, and decreed to pay unto the receiver to be appointed herein such sum as shall be found due and unpaid for and on account of either or both of said contracts, to be held for the use and benefit, and as a part of the assets of the said firm of Davis, Sprague & Company.

7. That the said Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, H. S. McComb, C. S. Bushnell, and Benjamin E. Bates, trustees as aforesaid, their agents and servants, be restrained from paying any part of the sums remaining unpaid, on account of either or any of said contracts, to J. W. Davis, or his order, or to his agent or attorney, or to J. W. Davis and Associates, their order or representatives, until the further order of this court.

8. That defendant, James W. Davis, be restrained from acting or doing any act or thing in and about the business of the said firm of Davis,
240 Sprague & Company, or of the said firm of J. W. Davis and Associates, or from receiving or disbursing any of the funds of Davis, Sprague & Company, or of the firm known as J. W. Davis and Associates, or any funds received from the said seven trustees for account of any contract, except to the receiver to be appointed herein, until the further order of this court.

And that the plaintiffs and such other parties who shall duly show their interest and unite in this action may have such other or further relief, or both, in the premises as to the court shall seem fit, with the costs of this action.

CLARK BELL,
Plaintiffs' Att'y.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

William F. Durant and Mordecai B. Sprague, two of the plaintiffs in this action, and united in interest with the other plaintiffs, being duly sworn, say:

That the foregoing complaint is true of their own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters they severally believe it to be true.

M. B. SPRAGUE.
W. F. DURANT.

Subscribed and sworn to before me this 26th day of September, 1870.
M. A. POTTER,
Notary Public, N. Y. Co.

SCHEDULE A.

COZZENS HOTEL, OMAHA, *Nov. 19th*, 1867.

S. B. REED, *Supt., &c., or Committee:*

SIR: On behalf of myself and associates I propose to furnish your

company with ties as follows: 100,000 to be delivered on the line
241 of road in the vicinity of Ft. Saunders, at 70c. each (50,000 of above, if that amount can be obtained in cañons of Black Hills, at 65c. each); 100,000 on line of road at or near the Big Laramie River, at 70c. each; 200,000 on line of road at or near the Big or Little Laramie River, to wit, 100,000 at 75c. each, and 100,000 at 80c. each; 600,000 on line of road at Little Laramie River, North Platte River, or intermediate points, to wit, 300,000 at 90c. each, and 300,000 at 95c. each.

If prices are satisfactory, the details of contracts, time of delivery, &c., can be arranged at once, and if required, security will be given for its performance to the amount of $100,000. If this is accepted we will purchase the present outfit of the company now at Saunders and assume the payment for the ties.

We will also purchase the saw-mill at a fair price, and furnish all lumber it will cut for the next twelve months (if required), delivered on line of road at forty-two dollars per thousand feet.

We will also furnish such timber as may be required at Dale Creek Bridge, say: Three hundred thousand (300,000 feet at $40 per M, and 300,000 feet at $45 per M).

It is understood that the arrangements in regard to transportation of men and outfit shall be the same as in former contracts, and that we shall have exclusive right to the timber.

JAMES W. DAVIS,
For Self, Sprague, and others.

P. S.—Will furnish hewed timber, 25 feet in length and under, delivered at a convenient point west of Saunders, for forty dollars per M.

JAMES W. DAVIS,
For Self and Associates.

Outfit shall be construed to mean wagons, teams, harness, and men, and does not include provisions, hay, feed, or groceries.

242 SCHEDULE B.

OMAHA, NEB., *Nov. 20th*, 1867.

To J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Your proposition to furnish this company with ties and timber, delivered at different points on the line of road, and dated November 19th, 1867, is accepted, and a contract will be drawn up embracing details, conditions, specifications, and explanations not sufficiently set forth in the proposition, substantially as follows:

1st CONDITION. The ties are to be delivered at the several points in such quantities as will furnish the road westward to the next point where ties are delivered, or beyond; the object being simply to prevent the hauling of ties by the railroad company eastward, and to fill up any deficiency.

2d CONDITION. The term outfit, when the same is used in the clause relating to the transportation by the company over their line, shall be construed to mean men, tools, and teams.

3d. All expenses of outfit (as per bills) pertaining either to the ties now being cut at Laramie River, or the saw-mill at this point, or other places, when the same are used or incurred in the performance of that portion of

work assumed by contractors, including cost of houses at Fort Saunders, shall be charged to them at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

The price of saw-mill to be fixed at $3,500; you to take two or four of the mules and wagons, intended for Dale Creek, at cost.

4th. The railroad company reserves the right to deduct from the number of ties proposed to be delivered at Fort Saunders and in the vicinity, and intended to be procured from the places in the Black Hills
243 and vicinity where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as this committee may agree upon as a compromise with the said parties; and nothing in this contract relative to the exclusive right of timber shall interfere with said committee giving consent to the procuring of such amount as may be agreed upon at these points to affect that compromise.

The company to charge the contractors and deduct from the estimate the cost, up to the present time, of labor on ties, saw-mill, and cost of hauling.

Payments to be made on monthly estimates as ties are delivered; and in case the contractors haul them a portion of the distance and pile them up for inspection, to be delivered on road in the spring, a fair estimate shall be made and payments made thereon; but no payments shall be made on ties simply cut and laying in the woods and hewed; but all ties shall be at the risk of contractors until delivered on line of road.

It is understood that timber shall be got out according to bill. The contractors may go on with the work if they consent to the above; but the contract, after being drawn, shall be sent to New York to be approved and executed.

(Signed) SIDNEY DILLON,
T. C. DURANT,
Committee.

Approved at meeting of trustees, Dec. 3, 1867.

H. C. CRANE,
Secretary.

SCHEDULE C.

Copy of contract.

J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Referring to your proposition of 19th November, and its acceptance November 20, 1867, by committee, and approval of trustees December 3, 1867, I have framed the following contract, to wit:
244 Memorandum of agreement, made and entered into this 3d day of December, 1867, by and between J. W. Davis for himself and others, the party of the first part, and H. C. Crane, secretary for trustees, of the second part, witnesseth: That for and in consideration of the stipulations and agreement hereinafter set forth, the parties of the first part agree to deliver to the parties of the second part railroad ties, in and after the following manner, to wit: 100,000 ties to be delivered on the line of

railroad of the Union Pacific Railroad Company in the vicinity of Fort Saunders, at 70c. each (50,000 of the above, if that amount can be obtained in cañons of the Black Hills, at 65c. each); 100,000 ties at or near the Big Laramie River, at 70c. each; 200,000 ties on line of road at or near the Big or Little Laramie River, to wit, 100,000 at 75c. each and 100,000 at 80c. each; 600,000 on the line of road at Little Laramie River, North Black River, or intermediate points, to wit, 300,000 at 90c. each, and 300,000 at 95c. each; all of the above to be of the size required by the specification of the engineer in charge of construction, and to be delivered as fast as may be required by the party of the second part in course of construction of the road.

The parties of the first part also agree to purchase the outfit of the company now at Saunders, and assume the payment for the ties at that point. Also to purchase the saw-mill for the sum of $3,500, and to furnish all lumber it will cut for the next twelve (12) months (if required so to do), and deliver the same on line of road at forty-five ($45) dollars per M.

The parties of the first part also agree to furnish such timber as may be required at Dale Creek bridge, say 300,000 feet at forty ($40) dollars per M, and 300,000 feet at forty-five ($45) dollars per M; and will also deliver hewn timber, twenty-five (25) feet and under in length, at convenient points west of Saunders, at forty (40) dollars per M.

All expenses of outfit, as per bill, pertaining either to the ties
245 now being cut at Laramie River or the saw-mill at Little Laramie, or at other places where the same are used or incurred in the performance of that portion of the work assumed by contractors, including cost of house at Saunders, shall be charged the parties of the first part at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

In transportation the term outfit shall be construed to mean wagons, harness, teams, and men, and does not include hay, feed, or groceries.

Payments made by the company for labor on ties, prior to the assumption of the parties of the first part to pay for the same, shall be deducted from the first estimate, and for the saw-mill and other outfit, including house, from the second and third estimate.

Equal amounts from each payments to be made monthly, on estimate of the engineer in charge of construction, as ties are delivered; and in case the parties of the first part haul them a part of the distance and pile them up for inspection in piles of not less than one thousand (1,000), to be delivered on road in spring, a fair estimate shall be made and payments made thereon, but no payments shall be made on ties simply cut and lying in the woods and hewed, but all ties shall be at risk of parties of the first part until delivered on line of road.

It is also understood that timber shall be got out according to bill.

The parties of the second part reserve the right to deduct from the number of ties proposed to be delivered at Ft. Saunders, and in the vicinity, and intended to be procured from the places in the Black Hills and vicinity where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as the trustees may agree upon on a compromise with the said parties, and nothing in this contract relative to the exclusive right of timber shall interfere with said parties of the second part giving consent to the procuring of such amounts as may be agreed upon at the points to affect that compromise.

246 It is understood that the ties are to be delivered at the several points in such quantities as will furnish the road westward to the next point where ties are delivered or beyond, the object being simply to prevent the hauling of ties by the railroad company eastward to fill up any defici'es. In making the payments on estimate for the ties delivered on the line of road at the several points provided for, twenty (20) per cent. shall be reserved on each lot as designated by the several prices herein named, but in no case shall the said reservation be more than fifty thousand (50,000) dollars.

In witness whereof the parties have signed and sealed these presents.

H. C. CRANE,
Secretary for Trustees.
J. W. DAVIS,
For Self and Associates.

New York supreme court.

WM. F. DURANT ET AL.
ag'st
JAMES W. DAVIS ET AL.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Mordecai B. Sprague, being duly sworn, says that he is a member of the firm of Davis, Sprague & Company.

That he has charge of the work in the performance of the contract with the seven trustees as general superintendent of the said firm of Davis, Sprague & Company, and that all the material allegations contained in the foregoing complaint are true within the personal
247 knowledge of this deponent. That as to the matters alleged upon information and belief he verily believes the said allegation contained in said complaint to be true.

Deponent further says that unless the said James W. Davis be restrained from receiving or disbursing the funds of said company, or from acting longer for said company, that the plaintiffs in this action and all the parties in interest will suffer great and irreparable injury.

That said defendant James W. Davis is now endeavoring to collect and receive funds from the said seven trustees for account of said contracts or some of them.

M. B. SPRAGUE.

Subscribed and sworn to before me this 26th day of September, 1870.

M. A. POTTER,
Notary Public, N. Y. Co.

State of New York, supreme court.

WILLIAM DURANT ET AL.
ag'st
JAMES W. DAVIS ET AL.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

William F. Durant, being duly sworn, says that he is one of the above-

named plaintiffs, and a member of the firm of Davis, Sprague & Co., owning three-tenths interest in the said contracts with the trustees.

That most of the allegations contained in the foregoing complaint are true within the personal knowledge of this deponent.

248 That he verily believes that all the allegations contained in said complaint are true.

That unless the said James W. Davis be restrained from acting for said company, or for receiving or disbursing any further moneys due the said companies from the said seven trustees, the plaintiffs and all parties in interest will suffer great loss and irreparable injury.

W. F. DURANT.

Subscribed and sworn to before me this day of September, 1870.

M. A. POTTER,
Notary Public, N. Y. Co.

Injunction by order.

Supreme court, New York City and County.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox *ag'st* JAMES W. DAVIS ET AL.

It appearing satisfactorily to me by the affidavits of Mordecai B. Sprague, William F. Durant, and the complaint of the plaintiffs, that sufficient grounds for an order of injunction exists, I do hereby order that the defendant James W. Davis, his agents, servants, and attorneys, refrain from acting or doing any act or thing in and about the business of the firm of Davis, Sprague & Company, or of the firm known as J. W. Davis and Associates, and from receiving or disbursing any of the funds of said Davis, Sprague & Company, or of the said firm of J. W. Davis and

249 Associates, or any funds received from the trustees for account of any contract, except to the receiver to be appointed herein, whether standing in his own name or the name of the firm, or either of them, or in the name of his wife, until the further order of the court.

And it is further ordered that the defendants Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Cornelius S. Bushnell, Henry S. McComb, and Benjamin E. Bates, their agents, clerks, servants, and attorneys, each and severally, refrain from paying any moneys whatever on account of work done by either of said companies, or by J. W. Davis, on account of either or any of said contracts, to James W. Davis, or to his order, or to his agent or attorney, or to J. W. Davis and Associates, their order, creditors, or representatives, until the further order of this court, and in case of disobedience to this order, you will be liable to the punishment therefor described by law.

Dated September 28, 1870.

ALBERT CARDOZO, *J. S. C.*

At a special term of the supreme court, held at new city hall, in the city of New York, on the 28th day of September, 1870.

Present, Hon. A. Cardozo, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and PIERSON S. MATTOX, plaintiffs,
ag'st
JAMES W. DAVIS ET AL., DEFENDANTS.

On reading the duly verified complaint of the plaintiffs this ac-
250 tion, and the affidavits of William F. Durant and Mordecai B. Sprague, on motion of Clark Bell, attorney and counsel for the plaintiffs, it is—

Ordered that Francis M. Bixby, esq., be, and he hereby is, appointed a receiver of the firm of Davis, Sprague & Company, with the full and usual powers of receivers in such cases.

That the said receiver, before entering upon his duties, shall duly make and file a bond as receiver, with surety, to be approved by a justice of this court, in the sum of five thousand dollars.

And it is further ordered and directed that the said receiver receive, sue for, collect, and hold subject to the order of this court, all the assets, money, choses in action, and property of the said firm of Davis, Sprague & Company.

Also, all the assets, property, and effects of the said firm known as J. W. Davis and Associates, and all sums due either of said firms from the said seven trustees, and from all other sources.

Also, all money property standing in the name of the said James W. Davis or his wife, Elizabeth Davis.

And it is further ordered that the defendant James W. Davis duly and immediately transfer, assign, and deliver over unto the said receiver, all such assets, property, choses in action, and claims, on demand being made thereof by the said receiver, together with all books, papers, or accounts now in his possession, under his control, and in the hands of his agents, attorneys, clerks, or other persons.

Ent.

A. C., *J. S. C.*

A true copy:

CHARLES E. LOEW, *Clerk.*

251 In the supreme court, city and county of New York.

WILLIAM F. DURANT ET AL.
vs.
JAMES W. DAVIS ET AL. } Answer.

James W. Davis and James H. Gessner, for answer in the above-entitled cause, say:

1. They admit the making by said Durant of the several papers, writings, and contracts attached to the said complaints, marked "Schedule A and C," and say that the same were made by him in the expectation that others would be associated with him in the execution of said contracts, but at the time it remained undetermined who such persons should be and what interest each should hold therein. That afterwards the said plaintiffs Durant and Sprague and the defendants, Richards, Ruth, Gessner, and others, were associated with this defendant, Davis, in the said enterprise, and they and he had therein the relative interests in the said complaint in

that behalf alleged, save that this defendant, Davis, had and retained two-tenths, but these defendants deny that the said Mattox ever had any interest therein.

2. No firm name of the said parties was ever agreed upon or adopted by them, but they at first assumed the style of Davis, Sprague & Co., and in their dealings with all parties, save the said defendants, trustees, parties of the second part to said contract, they for a long time used that style,
252 but the said trustees from the first kept their accounts with this defendant, Davis, and his copartners in the name of James W. Davis and Associates, and afterwards the entire business of said firm was transacted under that style. But the two names of Davis, Sprague & Co. and James W. Davis and Associates described and designated one firm and one set of parties only, and from the making of said contract down to the present time but one firm has ever existed engaged in executing said contract; and the said one firm did execute the said contract in full, and is entitled to have from said trustees a large sum of money in consideration thereof and of the business next hereinafter mentioned.

3. Said Davis has received no money from said seven trustees, or otherwise, under said contract, save as the duly authorized and empowered managing agent and officer of said firm, as well when acting in one as when acting in the other of said firm names, nor has he used any money so coming to his hands save in the due and proper discharge of his duties as such agent.

4. This defendant, Davis, together with his said associates, executed the contract attached to said complaint and marked Exhibit L, and thereupon they continued to furnish said trustees other like material as in said contract is mentioned until the work of building the Union Pacific Railroad was completed. That the means acquired by said firm, as well under the style of Davis, Sprague & Co. as under that of James W. Davis and Associates, in executing said first contract, was expended in the course of its business so continued as aforesaid. That each of the members of said firm, and especially said plaintiffs, Durant and Sprague, assented to the continuance of said business and the use of its means as aforesaid, and but one firm performed said first contract and the service afterwards rendered, and the members thereof were and are those in the said complaint mentioned as members of the firm of Davis, Sprague & Co.

5. This defendant, Davis, has never wrongfully, or without the knowledge, consent, or concurrence of the said plaintiffs, or either of them,
253 taken any of the assets or funds of the said Davis, Sprague & Co. and invested the same in the name of his wife; but says that, by reason of divers services by him rendered in and about the said business, he became and was entitled to have from it large sums of money; that a part thereof being by said firm paid to him, he, as he had a right to do, invested the same in the name of his said wife; and he says that neither he nor his said wife are in any way liable to the said firm, or any member or creditor therefor, for the same or any part thereof.

6. This defendant, Davis, denies that he is insolvent, or is squandering or wasting, or has squandered or wasted, the assets of said firm, under either of its two styles above mentioned; and he further says that, at the instance of said plaintiffs, Durant and Sprague, and others interested therein, he empowered the counsel of said firm to settle the claims by it alleged

against said trustees, and receive the money arising therefrom and pay the same to the creditors of said firm as far as was necessary; that thereby he divested himself of all control of the said assets, and secured the same to the parties thereunto entitled.

7. These defendants deny each and every allegation in the said complaint contained.

Wherefore, these defendants pray to be hence dismissed, with costs.

STATE OF NEW YORK,
City and County of New York, ss:

James W. Davis, being duly sworn, says he is the defendant in the above answer; that he has read the said answer and knows the contents thereof, and the same is true of his own knowledge.

JAMES W. DAVIS.

Subscribed and sworn to before me this 11th day of October, 1870.

SAM'L P. PELL,
Notary Public, N. Y. City and County.

254 Supreme court.

WILLIAM F. DURANT AND OTHERS
agst.
THOMAS C. DURANT, OLIVER AMES, AND OTHERS, impleaded, &c.

The defendants, Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, answering the platntiffs' complaint, say:

That they have no knowledge or information sufficient to form a belief as to the existence of a partnership under the name of Davis, Sprague & Company, or of the persons composing any such firm, or of the business of such firm.

That they admit that they made the contract set forth in Schedules A, B, and C, annexed to said complaint, with James W. Davis, who professed to act for himself, Mordecai B. Sprague, and others, but who such other persons were or are, or what are their respective rights or interests in said contract, or whether the plaintiffs and other persons are interested therein as alleged in the complaint, these defendants have no knowledge or information sufficient to form a belief.

They admit that said contract has been performed by said Davis and his associates, and that said Davis became thereby entitled to receive and has received large sums of money from these defendants; and whether he has also received large sums of money from other sources, the avails of said contract done and performed, and whether the total
255 receipts by said Davis from an account of said contract amounted to two hundred and twenty-five thousand dollars and upwards, and whether he neglects or refuses to divide the same among his partners or associates, these defendants have no knowledge or information sufficient to form a belief.

And these defendants admit that after the said contract hereinbefore mentioned had been performed by the said Davis, and after he had received

payment from these defendants for all the work done and materials furnished pursuant to the same, he, the said Davis, did furnish and deliver other ties, lumber, and materials to these defendants from time to time, at prices specified and agreed upon between them with respect to each particular delivery of such material. But these defendants say that for all the ties, lumber, and other materials so actually delivered and furnished by the said Davis individually, or on behalf of himself and others, after the performance of the contract aforesaid, these defendants made full payment, according to the price and terms agreed upon as aforesaid, except as hereinafter mentioned.

And these defendants further say that afterwards, and about day of 1868, the said Davis offered and proposed, on behalf of himself and his partners or associates, to sell and deliver to these defendants, as trustees, ties and lumber, at certain prices fixed and agreed upon, to an amount somewhat exceeding two hundred thousand dollars.

That these defendants accepted said proposal, and agreed to pay the prices fixed upon for said ties and lumber upon delivery.

That said Davis proceeded to prepare and transport to the line of the Union Pacific Railroad Company, ties and lumber in a very considerable quantity, but what precise quantity these defendants are not informed, which ties and lumber were intended for delivery to these defendants pursuant to such proposal and offer.

That these defendants were and have been ready and willing to accept the same, and pay the price stipulated therefor, whenever the delivery of the same should be completed.

256 But these defendants are informed and believe that the said Davis was unable, and still continues unable, to complete the delivery of the said materials, in consequence of legal process having been issued against him for the collection of debts due by him; by virtue of which process the said materials, and ties, lumber, etc., have been, and continue to be, attached or seized in such wise as to prevent the same from passing under the control of these defendants, or becoming available to them, so as to justify them in paying the prices for the same.

And these defendants, further answering, deny that any sum or amount is due from them to the said Davis, or to the said Davis and his associates, for or by reason of the ties, lumber, or materials last above mentioned.

And these defendants further deny that any sum whatever is due from them to the said Davis, or to the said Davis and his associates for ties, lumber, or materials sold and delivered by the said Davis to them at any time. But, on the contrary, these defendants say that for all the ties, lumber, and material delivered by said Davis for himself or his associates, previous to the last attempted and incomplete delivery hereinbefore mentioned, the said Davis has received full payment.

And these defendants aver the truth to be, that they have paid and advanced to the said Davis, on account of ties, lumber, and materials so as aforesaid delivered by him and received by them, more than the price or value thereof would amount to, and that the said Davis and his associates are indebted to these defendants for such overpayment.

These defendants have no knowledge or information sufficient to form a belief whether the said Davis wrongfully took any funds and profits of the firm of Davis, Sprague & Co., or any funds and profits received by him

from these defendants, or any funds in which the plaintiff had any right or interest, or invested the same, or any assets and materials belonging to the said firm, in the ties, lumber, or materials delivered by him to these defendants, or attempted to be delivered, as hereinbefore mentioned. These defendants deny that the said James W. Davis, for himself or for
257 any associates, made any contract with them subsequent to the contract herein above first mentioned, except the sale and delivery of particular parts of ties and materials as above mentioned, and the offer and acceptance of other materials of which this action is incomplete, as hereinbefore stated.

These defendants have no knowledge or information sufficient to form a belief whether the said Davis has organized or created any new firm or partnership under the name or style of James W. Davis and Associates, or who are the parties composing said new firm, if any, or interested in any work done or material furnished by the said Davis for or in the employment of these defendants.

These defendants deny that they are justly indebted to the plaintiffs or to the firm of Davis, Sprague & Co., or either of them, in any amount whatever; and these defendants have no knowledge or information sufficient to form a belief whether the plaintiffs are interested in any of the matters and things stated in said complaint or in this answer.

These defendants are ready to receive the said materials, ties, lumber, etc., which they agreed to purchase of the said James W. Davis, and to pay for the same whenever the said Davis, or the said plaintiffs, or the said parties interested in the same shall complete the delivery thereof, and remove the liens, attachments, and seizures by which the same are, as these defendants are informed and believe, at present incumbered; and, upon such delivery, these defendants are ready to account and settle all the matters and things between them and the said Davis and his associates, or parties interested in the work or contract entered into and furnished and performed by him.

These defendants have no knowledge or information sufficient to form a belief whether said Davis has wrongfully invested funds of the firm of Davis, Sprague & Co. in the name of his wife, or whether he has or has been wasting the property of said firm, or property belonging to James W. Davis and his associates, or any property in which the plaintiffs are interested, or whether he is insolvent.

258 And these defendants ask that an account may be taken between them and the said James W. Davis, and any other person who may be interested in the contract, work, and materials hereinbefore and in the said complaint referred to, and they submit to the judgment of the court in the premises, and ask to be protected in making payment for any work and materials aforesaid, and pray the judgment and direction of the court as to the party or parties to whom such payment shall be made, if delivery of said materials shall be completed; and in the event that no such complete delivery can be made, that they may have judgment against the said James W. Davis for the excess and overpayment so made by them to him as aforesaid, and that they may be discharged, with their costs and charges to be paid by the said James W. Davis, or to be allowed out of any fund or moneys due or to grow due to him in the premises.

HAMMOND & POMEROY,
Attorneys for above-named Def'ts.

CITY AND COUNTY OF NEW YORK, *ss:*

Thomas C. Durant and Sidney Dillon, two of the defendants above named, being duly sworn, depose and say that they have read the foregoing answer, and know the contents thereof, and that the same is true of their own knowledge, except as to those matters therein stated on information and belief, and as to those matters they believe it to be true.

SIDNEY DILLON.
THOMAS C. DURANT.

Sworn to before me this 27th day of October, 1870.

L. LAFLEN KELLOGG,
Notary Public, N. Y. City and County.

259 At a special term of the supreme court, held at the court-house, in the new city hall, in the city of New York, on the 2d day of November, 1870.

Present, Hon. A. Cardozo, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
ag'st
JAMES W. DAVIS, JAMES H. GESSNER, and others, defendants.

On reading and filing stipulations of attorneys for the plaintiffs and the defendants who have appeared in this action, on motion of Clark Bell, of counsel for plaintiffs, it is ordered—

That all the issues in this action be referred to A. A. Redfield, esq., as sole referee herein, who is hereby appointed as such, and empowered to hear and determine the same, with the usual and full powers of referees in such cases.

And it is further ordered that the said referee take and state an account of all claims justly chargeable upon the fund in question in this action, as well in favor of any and all of the parties hereto as also in favor of creditors of the respective copartnerships named in the pleadings, and each and all the allegations made in the complaint herein.

And it is further ordered that all books, papers, and writings relating to the matters in question in this action be placed subject to the order of said referee, to be produced before him upon his order, and be open to examination of the parties hereto or their counsel.

A copy.

CHAS. E. LOEW, *Clerk.*

260 N. Y. supreme court.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE and Pierson S. Mattox,
ag'st
JAMES W. DAVIS AND OTHERS.

It is hereby stipulated that an order may be entered in the above entitled action referring all the issues in the action to A. A. Redfield,

esq., as sole referree, to hear and determine the same, and also to take and state an account of all claims justly chargeable upon the fund in question in this cause, as well in favor of any and all of the parties hereto as also in favor of creditors of the respective copartnerships named in the pleadings.

That all books, papers, and writings relating to the matters in question in this cause be placed subject to the order of said referee, to be produced before him upon his order, and be open to examination of the parties hereto.

Dated New York, October 22, 1870.

J. M. WOOLWORTH,
Att'y def'ts Davis & Gessner.
HAMMOND & POMEROY,
Att'ys for Durant et al.
CLARK BELL,
Plaintiffs' Att'y.

261 At a special term (chambers) of the supreme court, held at the court house, in the new city hall, in the city of New York, on the 11th day of November, A. D. 1870.

Present, Hon. John R. Brady, justice.

WILLIAM F. DURANT ET AL., PL'FFS,
ag'st
JAMES W. DAVIS, JAMES H. GESSNER, ET al., def'ts.

It appearing from the paper and proceedings in this action that the same is necessary, on motion of Clark Bell, attorney and counsel for the plaintiff's, after hearing Daniel W. Gillett, esq., of counsel for defendants Davis, and Gessner, and Messrs. Hammond & Pomeroy for all the other defendants who have appeared in this action consenting—

It is ordered that the receiver heretofore appointed in this action be authorized and directed to liquidate, adjust, and agree to and with the defendants Thomas C. Durant, John Duff, Sidney Dillon, Benjamin E. Bates, Cornelius S. Bushnell, Henry S. McComb and Oliver Ames, trustees, and with any other parties to this action or parties in interest—

1. On the amounts due or to become due from the said seven trustees to the firm of Davis, Sprague & Company, and to the firm of James W. Davis and Associates.

2. On the terms, conditions, and time of payment thereof by the said trustees into the hands of the receiver.

262 3. As to the liquidation, payment, and discharge of any claim or lien that may be necessary to be made or paid on ties, lumber, materials, or of any kind, to enable the receiver to obtain possession of and control of the said fund.

And it is further ordered that in case it becomes necessary for the receiver, out of the fund, to pay or discharge any liens upon ties, timber, lumber, or materials, or any claim for any purpose to carry out or into effect any arrangement or contract so made with said trustees or others to obtain the possession or control of the fund herein, that the receiver is hereby authorized in his discretion to take the opinion of the referee, A.

A. Redfield, esq., as to the nature of such claim or lien, its amount and character, and its validity as a lien, before allowing or paying the same; and in such case the said referee is empowered and directed to take proofs both for and against said claim or lien, and report his opinion thereon for the action of the said receiver in the premises.

A copy.

CHAS. E. LOEW, *Clerk.*

We hereby admit personal service of a copy of the within order. Dated New York, Nov. 12, 1870.

HAMMOND & POMEROY,
Def'ts' Attorneys.

263 At a special term (chambers) of the supreme court, held at the court-house, in the new city hall, in the city of New York, on the 11th day of November, A. D. 1870.

Present, Hon. John R. Brady, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
against
JAMES W. DAVIS, JAMES H. GESSNER, Timothy P. Richards, William Ruth, John Doe, Richard Roe, and Susan Doe, composing, with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, copartners, composing the firm of J. W. Davis & Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates and Elizabeth Davis, wife of James W. Davis, defendants.

On motion of Clark Bell, esq., attorney and counsel for the plaintiffs, and after hearing D. W. Gillett, esq., of counsel for the defendants James W. Davis and James H. Gessner, and Messrs. Hammond and Pomeroy, of counsel for the defendants T. C. Durant, John Duff, Sidney Dillon, Benj. E. Bates, H. S. McComb, Cornelius S. Bushnell, and Oliver Ames, all parties that have appeared consenting—

264 It is ordered, that all persons, parties, and corporations having claims against the firms of "Davis, Sprague & Company" and "James W. Davis and Associates," or either or both of said firms, present the same, together with their proofs in support of the validity thereof, to A. A. Redfield, esq., the referee heretofore appointed in this action, at his office, No. 20 Nassau street, in the city of New York, within twenty days from and after the service upon them, respectively, of a copy of this order.

And it is further ordered, that any claim against either of said firms not so presented within the time above limited shall be excluded from participation in the fund in question in this action, and from all funds that may come into the hands of the receiver herein.

And it is further ordered, that the said referee take proof in support of and adversely to the validity of any and all claims so submitted to him, and determine upon the validity thereof, and the amount justly due for principal and interest thereon, and from time to time report, as shall seem convenient to him, said claims, together with his findings of law and of fact thereon.

And it is further ordered, that service of this order may be made upon the several parties, persons, or corporations having claims or alleging demands against said firms, or either of them, as follows:

1. By delivering to them personally a copy of this order, and leaving the same with them.

2. By leaving a true copy thereof at the place of residence of said person or persons with some person found at such place of residence, or at the office of such corporation with some officer, director, clerk, or employé of such corporation, and that said service, whether personally or by copy, left at residence or office, may be served without the State of New York, if the said person or corporation to be served reside out of this State, or

265 3. By publishing this order once in each week successively in the following newspapers, to wit:

The Omaha Herald, a paper published in Omaha, Nebraska.

The Laramie Sentinel, a paper published at Laramie, in the Territory of Wyoming, and in the New York Times, a paper published in the city of New York, for the space of seven weeks.

And it is further ordered, that the publication so made shall be deemed full and sufficient service upon all such persons and corporations so alleging claims against both or either of said firms; and that all claims whatsoever not so presented by any person or coporation within twenty days after publication of this order has been duly made, as herein provided, shall be excluded from all participation in the fund in question in this action, and from all funds that may come into the hands of the receiver.

(A true copy.)

CHAS. E. LOEW, *Clerk.*

266 Supreme court.

WILLIAM F. DURANT ET AL., PLAINTIFFS,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS et al., defendants.

Consent is hereby given to the entry of the annexed order amending the summons and complaint in the above entitled action.

HAMMOND & POMEROY,
Att'ys for Trustees, T. C. Durant et al.
J. M. WOOLWORTH,
Att'y for J. W. Davis and Gessner.
By DANIEL W. GILLETT,
Of Counsel.
CLARK BELL,
Att'y for Plaintiffs.
EDWARD T. BARTLETT,
Att'y for Def't H. C. Crane, Trustee.

267 At a special term of the supreme court, held at the chambers thereof, in the court house, in the city of New York, on the 2d day of May, 1871,

Present, Hon. A. Cardozo, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE and Pierson S. Mattox, plaintiffs,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS et al., defendants.

A motion having been made to amend the summons and complaint in the above entitled action,

On motion of Clark Bell, attorney and counsel for the plaintiffs for the motion; and Messrs. Hammond & Pomeroy, of counsel for T. C. Durant and others, trustees, D. W. Gillett, of counsel for the defendants, James W. Davis and James H. Gessner; and E. T. Bartlett, as attorney and counsel for the defendant, Henry C. Crane, trustee for Wilhelmina Davis Train, consenting, it is

Ordered, that the summons and complaint in the above entitled action be amended, by inserting as defendant Henry C. Crane, trustee of Wilhelmina D. Train; and that the complaint be further amended, by inserting at folio ten of the complaint, after the words "James W. Davis one-tenth," these words, "Henry C. Crane, as trustee for Wilhelmina D. Train, one-tenth interest.

(A copy.)

CHAS. E. LOEW, *Clerk.*

268 Supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
against.
JAMES W. DAVIS, ET AL., DEFENDANTS.

Copy amended summons, complaint, affidavits, injunction, and order appointing a receiver.

Clark Bell, plaintiff's attorney, 20 Nassau street, N. Y.

New York, Russell's American Steam Printing House, Nos. 17, 19, 21, 23, Rose Street, 1873.

269 *Amended summons.*

N. Y. supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, Henry C. Crane, trustee for Wilhelmina Davis Train; John Doe, Richard Roe, and Susan Doe, composing, with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, as copartners, composing the firm of J. W. Davis and Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, and Elizabeth Davis, wife of James W. Davis, defendants.

To the above-named defendants.

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 20
Nassau street, in the city of New York, within twenty days after
270 the service hereof, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated September 26, 1870.

CLARK BELL,
Plaintiffs Attorney.

New York supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, Henry C. Crane, trustee of Wilhelmina Davis Train; John Doe, Richard Roe, and Susan Doe, composing with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, as copartners, composing the firm of J. W. Davis, and Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates and Elizabeth Davis, wife of James W. Davis, defendants. } Amended complaint

The plaintiffs complain of the defendants and say:
271 That the plaintiffs and the defendants James W. Davis, James

H. Gessner, Timothy F. Richards, William Ruth, John Doe, Richard Roe, and Susan Doe, were and are copartners, doing business as such under the firm name and style of Davis, Sprague & Company.

That heretofore, to wit, on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant, James W. Davis, acting for himself and the said above named parties so comprising the said firm of Davis, Sprague & Company, as aforesaid, of the first part, at the city of New York, made a contract with the defendants, Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, parties of the second part, for the delivery by the said James W. Davis and his associates, so comprising the firm of Davis, Sprague & Company, unto the said parties of the second part of a large quantity of railway ties, lumber, and timber, along the line of the Union Pacific Railroad, then in process of construction, at certain prices and upon certain terms and conditions, as will more fully appear by the memorandum of said contract, of which copies are hereunto annexed, marked Schedules A, B, and C, and which are referred to and to be taken as a part of this complaint.

That the business of the firm of Davis, Sprague & Co. referred to the work, and labor, and material to be done, used, and furnished in the performance by the party of the *the* first part of the said contract, so made as aforesaid, and so contained in Schedules A, B, and C, hereunto annexed.

That the interest of the respective parties in said contract were divided among the respective parties, members of the said firm of Davis, Sprague & Co., as follows: To Pierson S. Mattox, one-tenth interest; Mordecai B. Sprague, one-tenth; William F. Durant, three-tenths; Timothy P. Richards, one-tenth; William Ruth, one-twentieth; Henry C. Crane, as trustee for Wilhelmina Davis Train, one-tenth interest; James F. Gessner,
272 one-twentieth; James W. Davis, one-tenth; John Doe, one-twentieth, or thereabouts; Richard Roe, one-twentieth, or thereabouts; Susan Doe, one-tenth, or thereabouts.

That the precise amount of the interests of the said defendants, John Doe, and Richard Roe and Susan Doe, are unknown to the plaintiffs, but the same are as alleged, as plaintiffs are informed and believe.

That the real names of the said partners, John Doe, Richard Roe, and Susan Doe, are unknown to these plaintiffs, or the nature or character of their exact interest in the same; but the plaintiffs allege that certain persons unknown to them were interested in the said contract for the remaining two-tenths interest, which plaintiffs allege, upon information and belief, were held and owned as above alleged, and plaintiffs sue them in the name of John Doe, Richard Roe, and Susan Doe, as aforesaid, and some or one of them was so interested therein.

That the said parties composing the firm of Davis, Sprague & Company, and the said firm of Davis, Sprague & Company so composed, as aforesaid duly performed the said contract on their part, and full and duly delivered unto the said trustees, parties of the second part, all the ties, lumber, and timber therein by them agreed to be delivered, and in all other respects, and the same was fully accepted by the said trustees, parties of the second part, as fully performed in all respects, and the business of the firm completed and terminated.

That under the same the said firm of Davis, Sprague & Co., and the parties above named so composing the same, became entitled to receive large sums of money from the said trustees, as specified in the said contracts, schedules A, B, and C.

That the defendant James W. Davis has received large sums of money from the said seven trustees aforesaid, and from other sources, the
273 avails and profits of the said contract so done and performed as aforesaid by Davis, Sprague & Company, to wit, the sum of two hundred and twenty-five thousand dollars and upwards, and that he neglects and refuses to divide or distribute it among his copartners so composing the said firm of Davis, Sprague & Company as aforesaid.

That, without the knowledge, privity, or assent or concurrence of the plaintiffs, the said James W. Davis wrongfully took the funds and profits of the said firm of Davis, Sprague & Company, and so received by him from the seven trustees for work, and labor, and materials furnished under said contract specified in Schedules A, B, and C, and also assets and materials then on hand belonging to said firm, and invested the same, to wit, the sum of two hundred thousand dollars and upwards, in another and a new contract or contracts with the said seven trustees for the further delivery of ties, lumber, &c., on certain terms, prices and conditions, which are unknown to these plaintiffs in and for the benefit of a new and other firm, to wit, a firm known by the name of J. W. Davis and Associates, and composed of the said James W. Davis, the defendant, James H. Gessner, and certain other persons who are wholly unknown to these plaintiffs, but whose names, as these plaintiffs are informed and believe, and hereby charge, and by which names he joins them as defendants, are John Brown and William Brown and Sarah Brown, but the respective rights and interests of which are wholly unknown to these plaintiffs.

That the said defendant, James W. Davis, so organized the said new firm of James W. Davis and Associates as aforesaid, and so invested in the said new contract or contracts so made with the said seven trustees the funds of the said firm of Davis, Sprague & Co.

And that neither the plaintiff herein, nor the other above-named members of the firm of Davis, Sprague & Company, are members of the said new firm so organized of J. W. Davis and Associates, or in any wise interested in the said new contract or contracts so made with the said
274 seven trustees as aforesaid, as partners or participants in the profits or benefits thereof.

That the said firm so composed as aforesaid of J. W. Davis and Associates duly performed the said second contract or contracts, and became entitled to receive, and claim now to be entitled to receive, from the said seven trustees a large sum of money, to wit, the sum of three hundred thousand dollars and upwards.

That the said seven trustees, defendants as aforesaid, are justly indebted unto the above-named plaintiffs and the firm so composed of Davis, Sprague & Company, for the labor done and performed, and materials, &c., furnished as aforesaid, in a very large sum, to wit, in the sum of three hundred thousand dollars and upwards.

That all of the money due or remaining unpaid by the said Thomas C. Durant, Oliver Ames and others, trustees as aforesaid, unto the said J. W. Davis and Associates under the said new contract or contracts, in truth and

in fact, both in law and equity, belongs to the said firm of Davis, Sprague & Company; and the said trustees are indebted to these plaintiffs and the said firm therefor, in the sum of three hundred thousand dollars, or thereabouts or upwards.

That said James W. Davis further wrongfully, and without the knowledge, consent or concurrence of the plaintiff or of his copartners, took of the partnership funds and assets of the said firm of Davis, Sprague & Company, and so by him received from and under the said contracts, a large sum of money, to wit, the sum of thirty-five thousand dollars, and has wrongfully invested the same in his own name, or in the name of his wife, Elizabeth Davis, for his private use and benefit.

That the said James W. Davis is insolvent, and is a nonresident of the State of New York; that he resides in Omaha, Nebraska; that he is now wasting and squandering the property and assets of the said firm of
275 Davis, Sprague & Company and of the said firm of J. W. Davis and Associates, and that he has already wasted and squandered large sums of money, &c., the property of both and each of said firms.

That the plaintiffs bring this action for their own benefit, as well as for the benefit of all those who shall hereafter unite as parties to this action, contribute to the expenses of the same, and who may be entitled to become parties hereto, and for the benefit of all creditors who may hereafter unite in this action or be made parties hereto. Wherefore the plaintiff demands the judgment of this court.

1. That the partnership known as Davis, Sprague & Company be adjudged and declared to be dissolved and terminated, as well as the firm of J. W. Davis and Associates; that an accounting be had of the partnership business and assets, as well of the firm of Davis, Sprague & Company as of the said firm of J. W. Davis and Associates, and that a distribution of the firm property and assets be made of each of said firms among the respective parties in interest as the same shall appear.

2. That a receiver be appointed herein, pending the hearing and the determination of this action, of the property and assets of the said firm of Davis, Sprague & Company, with the full and usual powers of receivers in such cases.

3. That said receiver be directed to receive, sue for, and collect, and hold subject to the order of this court, beside the said assets of the firm of Davis, Sprague & Company, all the assets, property, and effects of the said firm of J. W. Davis and Associates, and all sums due either of said firms from the said seven trustees, and from all other sources; also, all money, property, real and personal, standing in the name of James W. Davis or his wife, Elizabeth Davis.

4. That the respective rights and interests of all the parties in the premises be fully adjusted, liquidated, determined, and settled between
276 all the parties, and an accounting had of all the business of both said firms; that an accounting be had between the firm of Davis, Sprague & Company and the said seven trustees, and between the said firm of J. W. Davis and Associates and the said seven trustees, and the respective rights settled between the said firms and parties; that an accounting be had between the firm of Davis, Sprague & Company and the said seven trustees, and between the said firm of J. W. Davis and Associates and the said seven trustees, and the respective rights settled between the said firms and parties.

5. That the amount due and owing by the said seven trustees may be adjudged and decreed to belong to and be the property of Davis, Sprague & Company, or that the said firm of Davis, Sprague & Company may be adjudged to be the creditors of the said firm of J. W. Davis and Associates, and be entitled to all the benefits and privileges of creditors, with a lien upon the said assets prior to the other creditors of that firm.

6. That the said Thomas C. Durant, Oliver Ames, Cornelius S. Bushnell, Sidney Dillon, John Duff, Henry S. McComb and Benjamin E. Bates, be ordered, adjudged, and decreed to pay unto the receiver to be appointed herein such sum as shall be found due and unpaid for and on account of either or both of said contracts, to be held for the use and benefit, and as a part of the assets of the said firm of Davis, Sprague & Company.

7. That the said Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, H. S. McComb, C. S. Bushnell, and Benjamin E. Bates, trustees as aforesaid, their agents and servants, be restrained from paying any part of the sums remaining unpaid, on account of either or any of said contracts, to J. W. Davis, or his order, or to his agent or attorney, or to J. W. Davis and Associates, their order or representatives, until the further order of this court.

8. That defendant, James W. Davis, be restrained from acting or doing any act or thing in and about the business of the said firm of Da-
277 vis, Sprague & Company, or of the said firm of J. W. Davis and associates, or from receiving or disbursing any of the funds of Davis, Sprague & Company, or of the firm known as J. W. Davis and Associates, or any funds received from the said seven trustees for account of any contract, except to the receiver to be appointed herein, until the further order of this court.

And that the plaintiffs and such other parties who shall duly show their interest and unite in this action may have such other or further relief, or both, in the premises as to the court shall seem fit, with the costs of this action.

CLARK BELL,
Plaintiff's Att'y.

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

William F. Durant and Mordecai B. Sprague, two of the plaintiffs in this action, and united in interest with the other plaintiffs, being duly sworn, says:

That the foregoing complaint is true of their own knowledge, except as to the matters which are therein stated upon information and belief, and that as to those matters they severally believe it to be true.

M. B. SPRAGUE.
W. F. DURANT.

Subscribed and sworn to before me this 26th day of September, 1870.

M. A. POTTER,
Notary Public, N. Y. Co.

SCHEDULE A.

COZZENS HOTEL, OMAHA,
Nov. 19th, 1867.

S. B. REED,
Supt., &c., or Committee:

SIR: On behalf of myself and associates I propose to furnish your company with ties as follows: 100,000 to be delivered on the line of
278 road in the vicinity of Ft. Saunders, at 70c. each (50,000 of above, if that amount can be obtained in cañons of Black Hills, at 65c. each); 100,000 on line of road at or near the Big Laramie River, at 70c. each; 200,000 on line of road at or near the Big or Little Laramie River, to wit, 100,000, at 75c. each, and 100,000, at 80c. each; 600,000 on line of road at Little Laramie River, North Platte River, or intermediate points, to wit, 300,000, at 90c. each, and 300,000, at 95c. each.

If prices are satisfactory, the details of contracts, time of delivery, &c., can be arranged at once, and if required security will be given for its performance to the amount of $100,000. If this is accepted we will purchase the present outfit of the company now at Saunders, and assume the payment for the ties.

We will also purchase the saw-mill at a fair price, and furnish all lumber it will cut for the next twelve months (if required) delivered on line of road at forty-two dollars per thousand feet.

We will also furnish such timber as may be required at Dale Creek Bridge, say, three hundred thousand (300,000) feet, at $40 per M, and 300,000 feet, at $45 per M.

It is understood that the arrangements, in regard to transportation of men and outfit, shall be the same as in former contracts, and that we shall have exclusive right to the timber.

JAMES W. DAVIS,
For Self, Sprague, and Others.

P. S.—Will furnish hewed timber, 25 feet in length and under, delivered at a convenient point west of Saunders, for forty dollars per M.

JAMES W. DAVIS,
For Self and Associates.

Outfit shall be construed to mean wagons, teams, harness, and men, and does not include provisions, hay, feed, or groceries.

279 SCHEDULE B.

OMAHA, NEB., *Nov. 20th*, 1867.

To J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Your proposition to furnish this company with ties and timber, delivered at different points on the line of road and dated November 19th, 1867, is accepted, and a contract will be drawn up embracing details, conditions, specifications, and explanations not sufficiently set forth in the proposition, substantially as follows:

1st CONDITION.—The ties are to be delivered at the several points in such quantities as will furnish the road westward to the next point where

ties are delivered or beyond, the object being simply to prevent the hauling of ties by the railroad company eastward and to fill up any deficiency.

2d CONDITION.—The term outfit, when the same is used in the clause relating to the transportation by the company over their line, shall be construed to mean men, tools, and teams.

3d. All expenses of outfit (as per bills) pertaining either to the ties now being cut at Laramie River, or the saw-mill at this point or other places, when the same are used or incurred in the performance of that portion of work assumed by contractors, including cost of houses at Fort Saunders, shall be charged to them at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

The price of saw-mill to be fixed at $3,500; you to take two or four of the mules and wagons intended for Dale Creek at cost.

4th. The railroad company reserves the right to deduct from the number of ties proposed to be delivered at Fort Saunders and in the vicinity, and intended to be procured from the places in the Black Hills
280 and vicinity where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as this committee may agree upon as a compromise with the said parties; and nothing in this contract relative to the exclusive right of timber shall interfere with said committee giving consent to the procuring of such amount as may be agreed upon at these points to affect that compromise.

The company to charge the contractors and deduct from the estimate the cost up to the present time of labor on ties, saw-mill, and cost of hauling.

Payments to be made on monthly estimates as ties are delivered; and in case the contractors haul them a portion of the distance and pile them up for inspection, to be delivered on road in the spring, a fair estimate shall be made and payments made thereon; but no payments shall be made on ties simply cut and laying in the woods and hewed; but all ties shall be at the risk of contractors until delivered on line of road.

It is understood that timber shall be got out according to bill. The contractors may go on with the work if they consent to the above; but the contract, after being drawn, shall be sent to New York to be approved and executed.

(Signed,) SIDNEY DILLON,
T. C. DURANT,
Committee.

Approved at meeting of trustees Dec. 3, 1867.

H. C. CRANE,
Secretary.

SCHEDULE C.

Copy of contract.

J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Referring to your proposition of 19th November, and its acceptance November 20, 1867, by committee, and approval of trustees December 3, 1867, I have framed the following contract, to wit:

281 Memorandum of agreement made and entered into this 3d day of December, 1867, by and between J. W. Davis for himself and others, the party of the first part, and H. C. Crane, secretary for trustees, of the second part, witnesseth: That for and in consideration of the stipulations and agreement hereinafter set forth, the parties of the first part agree to deliver to the parties of the second part railroad ties, in and after the following manner, to wit: 100,000 ties to be delivered on the line of railroad of the Union Pacific Railroad Company, in the vicinity of Fort Saunders, at 70c. each (50,000 of the above, if that amount can be obtained in cañons of the Black Hills, at 65c. each); 100,000 ties at or near the Big Laramie River, at 70c. each; 200,000 ties on line of road at or near the Big or Little Laramie River, to wit, 100,000 at 75c. each, and 100,000 at 80c. each; 600,000 on the line of road at Little Laramie River, North *Black* River, or intermediate points, to wit, 300,000 at 90c. each, and 300,000 at 95c. each; all of the above to be of the size required by the specification of the engineer in charge of construction, and to be delivered as fast as may be required by the party of the second part in course of construction of the road.

The parties of the first part also agree to purchase the outfit of the company now at Saunders, and assume the payment for the ties at that point. Also to purchase the saw-mill for the sum of $3,500, and to furnish all lumber it will cut for the next twelve (12) months, (if required so to do), and deliver the same on line of road at forty-five ($45) dollars per M.

The parties of the first part also agree to furnish such timber as may be required at Dale Creek bridge, say 300,000 feet at forty (40) dollars per M, and 300,000 feet at forty-five (45) dollars per M; and will also deliver hewn timber, twenty-five (25) feet and under in length, at convenient points west of Saunders, at forty (40) dollars per M.

282 All expenses of outfit, as per bill, pertaining either to the ties now being cut at Laramie River or the saw-mill at Little Laramie, or at other places where the same are used or incurred in the performance of that portion of the work assumed by contractors, including cost of house at Saunders, shall be charged the parties of the first part at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

In transportation the term outfit shall be construed to mean wagons, harness, teams, and men, and does not include hay, feed, or groceries.

Payments made by the company for labor on ties, prior to the assumption of the parties of the first part to pay for the same, shall be deducted from the first estimate, and for the saw-mill and other outfit, including house, from the second and third estimate.

Equal amounts from each payments to be made monthly, on estimate of the engineer in charge of construction, as ties are delivered; and in case the parties of the first part haul them a part of the distance and pile them up for inspection, in piles of not less than one thousand (1,000), to be delivered on road in spring, a fair estimate shall be made and payments made thereon, but no payments shall be made on ties simply cut and lying in the woods and hewed, but all ties shall be at risk of parties of the first part until delivered on line of road.

It is also understood that timber shall be got out according to bill.

The parties of the second part reserve the right to deduct from the number of ties proposed to be delivered at Ft. Saunders and in the vicinity, and intended to be procured from the places in the Black Hills and vicinity where Messrs. Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as the trustees may agree upon on a compromise with the said parties, and nothing in this contract relative to the exclusive right of timber shall interfere with said parties of the second part giving consent to the procuring of such amounts as may be agreed upon at the points to affect that compromise.

283 It is understood that the ties are to be delivered at the several points in such quantities as will furnish the road westward to the next point where ties are delivered or beyond, the object being simply to prevent the hauling of ties by the railroad company eastward, to fill up any defi'cies in making the payments on estimate for the ties delivered on the line of road at the several points provided for, twenty (20) per cent. shall be reserved on each lot as designated by the several prices herein named, but in no case shall the said reservation be more than fifty thousand (50,000) dollars.

In witness whereof the parties have signed and sealed these presents.

H. C. CRANE,
Secretary for Trustees.
J. W. DAVIS,
For Self and Associates.

284 At a special term of the supreme court, held at chambers at the court-house, in the city of New York, on the 17th day of October, 1871,

Present, Hon. Daniel P. Ingraham, justice.

WILLIAM F. DURANT, ET AL.
vs.
JAMES W. DAVIS AND OTHERS.

It is hereby ordered that it be referred to Amasa A. Redfield, the referee herein before appointed, to hear, determine and report upon the amount due or to grow due to the parties herein, or to either of them, from the defendants, Sidney Dillon and others, as trustees for the contractors for building the Union Pacific Railroad, on account of the matters in this action alleged, and that he report thereon without delay.

(A copy.)

CHARLES E. LOEW, *Clerk.*

285 N. Y. supreme court.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE and Pierson S. Mattox, plaintiffs,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS, William Ruth, Thomas C. Durant, and others, defendants.

To the supreme court of the State of New York.

The undersigned respectfully reports to this court that, by an order of

this court, bearing date the second day of November, 1870, the undersigned was appointed sole referee to hear and determine this action, and to take and state an account of all claims justly chargeable upon the fund in question in this action, as well in favor of any and all of the parties hereto, as also in favor of all creditors of the respective copartnerships named in the pleadings and of each and all of the allegations of the complaint.

That by an order of this court, bearing date the 11th day of November, 1870, all persons, parties, and corporations having claims against the said respective firms, or either or both of them, were required to present the same, together with their proofs in support of the validity thereof, to me, the undersigned referee, as aforesaid; and by the same order I was required to take proof in support of and adversely to the validity of any and all claims so submitted to me, and determine the validity of
286 the same and the amount justly due for principal and interest thereon, and make report thereof.

I hereby report that I have been attended by the parties and their respective counsel, and have duly considered the allegations and proofs of the parties.

I find as matters of fact:

1. That on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant, James W. Davis, at the city of New York, made a contract in writing with the defendants, Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. Comb, Cornelius S. Bushnell and Benjamin E. Bates, trustees, &c., parties of the second part, for the delivery by the said James W. Davis and his associates unto the said party of the second part of a large quantity of railroad ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices and upon certain terms and conditions, a copy of which contract is annexed to the complaint.

2. That subsequently, at various times between the 20th day of November, 1867, and the 20th day of November, 1868, said Davis, for a valuable consideration to him paid, assigned proportionate interest in the profits and business of the said contract to, and associated with himself in the performance of said contract, certain parties, to wit: Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train, to wit, on the 20th day of November, 1867, the said James W. Davis made, executed, and delivered to William F. Durant an instrument in writing, of which the following is a copy, viz:

OMAHA, *Nov.* 20, 1867.

For a valuable consideration I hereby assign to William F. Durant, of Chicago, Illinois, the undivided three-tenths of a certain contract with H. C. Crane, as secretary of trustees, for delivery of one million of ties and lumber required by said trustees under said contract.
287 This agreement extends also to all merchandise purchased and sold under said agreement, and all profits incidental thereto. I hereby agree, for myself and associates, to pay over when required unto the said William F. Durant, or his agent, any dividends which may hereafter be declared under said contract, and duly admit him as a copartner equal to three-tenths interest in said contract.

In witness whereof I have, on this 20th day of November, A. D. 1867, for myself and associates, affixed my hand and seal.

JAMES W. DAVIS AND ASSOCIATES,
By JAMES W. DAVIS, *Attorney.* [SEAL.]

[5 cts. I. R. stamp, cancelled.]

On the 22d day of November, 1867, said James W. Davis made, executed, and delivered to Mordecai B. Sprague an instrument in writing, of which the following is a copy, viz:

Whereas, on the 20th day of November, 1867, James W. Davis and Associates entered into a written contract with the contractors of the Union Pacific Railroad for cutting and delivering of one million ties and two million feet of lumber, upon conditions and specifications therein named; and be it known that M. B. Sprague, of Omaha, Nebraska, is duly admitted a copartner in the above agreement to the extent of one-tenth interest of the entire business, subject to all the conditions, and shall, for his pro rata share of all which may arise, and of such agreement, and entitled to his proportionate share of profits, if any such are hereafter made. The consideration of this agreement is that said Sprague shall be and act for the company represented by James W. Davis as their general superintendent of the tie and lumber business, shall employ the men and make all necessary sub-contracts for labor which may be necessary to execute the agreement first above referred to. Said Sprague shall render monthly statements of mercantile business, giving amount of ties and lumber
288 delivered or on hand, with costs, as near as can be approximated thereto, of getting out the same; shall issue orders to the supply department for goods sold to all employés of the company, which orders will be paid and charged in merchandise account by the person in charge of such department at Fort Saunders. Said Sprague, for such supervision, shall receive from the firm a salary of two hundred and fifty dollars per month, dating from November 20th, 1867, to be charged in the general expense account. It is expressly agreed that, for good and sufficient cause, said Sprague may be removed by the voice of the majority in interest as such employé, but no change or removal shall affect the right of said Sprague under this contract.

The consideration of this agreement is that the said Sprague shall act with zeal and fidelity, and in person superintend, manage, and direct all the details of the business as regards the cutting of ties or sawing of timber, as specified in contract of date November 20, 1867, to which, in all its specifications, this agreement has special reference, and generally to do and perform all necessary acts requisite for the successful performance of said agreement.

In witness whereof I have, on this 22d day of November, 1867, for and in behalf of myself and associates, affixed my hand and seal.

JAMES W. DAVIS AND ASSOCIATES. [SEAL.]

Attest:

AUG. HIGBY, *Witness.*

[5 cts. I. R. stamp, cancelled.]

On the 8th day of January, 1868, the said James W. Davis made, executed, and delivered to James H. Gessner an instrument in writing, of which the following is a copy, viz:

Whereas, on the 20th day of November, 1867, James W. Davis, of Nebraska, entered into a certain contract in writing with the trustees and contractors for the construction of the Union Pacific Railroad, for the cutting and delivering on the line thereof of one millon ties and two million
289 feet of lumber, at certain prices therein designated, to which written agreement of date aforesaid this certificate specially refers:

Now, be it known, for a valuable consideration to me in hand paid, James H. Gessner, of the State of Nebraska, is this day admitted by me as a copartner, to the extent and limit of ($\frac{1}{20}$) one-twentieth interest in all profits as well as all losses accruing from or in any way arising out of such written contract so made as aforesaid by James W. Davis, representing the firm of James W. Davis and his associates.

It is expressly agreed and understood that James H. Gessner shall give his personal and active aid in securing the successful prosecution of all works or duties hereafter to be assigned him by the general superintendent in charge of said works; and for such services so rendered as aforesaid, a just and reasonable compensation, to be paid by James W. Davis, shall be allowed said Gessner, the same to be paid monthly.

Said Gessner shall be removed only for legal cause; but in the event of such removal, only for good and sufficient cause, no rights of said Gessner in said contract, as attested by their certificate, shall be impaired or forfeited.

Upon the surrender of this certificate unto James W. Davis dividends may hereafter be declared and paid over, under and with the approval of the majority in interest, who hold such written evidence of interest in such contract.

In testimony whereof I have, on this the 8th day of January, 1868, at the city of Omaha, and State of Nebraska, for myself and my said associates, affixed my hand and seal.

JAMES W. DAVIS, *Trustee.*
JAMES W. DAVIS AND ASSOCIATES.

On the 20th day of November, 1868, the said James W. Davis made, executed, and delivered to Timothy P. Richards, Pierson S. Mattox, and H. C. Crane, trustee for W. D. Train, an instrument in writing, of which the following is a copy, viz:

OMAHA, *November* 20, 1868.

290 For a valuable consideration to me paid, I hereby assign to T. P. Richards, P. S. Mattox, and H. C. Crane, trustee for W. D. Train, of New York, ($\frac{3}{10}$) three-tenths of a certain contract with H. C. Crane, as secretary of the trustees, for the delivery of one million ties, and lumber required by the Union Pacific Railroad, under said agreement.

This assignment extends to all merchandise sold under such contract, and all profit of same. I hereby agree for myself and associates to pay over, when required, unto each of them, or order on their separate ($\frac{1}{10}$) interest any dividends which may be hereafter ascertained, and hereby admit him as a copartner, equal to three-tenths interest in said agreement.

In witness whereof I have, on this 20th day of November, 1868, for myself and associates, affixed my hand and seal.

JAMES W. DAVIS AND ASSOCIATES,
By JAMES W. DAVIS, *Attorney.* [SEAL.]

[5 cts. I. R. stamp cancelled.]

And on the day of , the said James W. Davis made, executed, and delivered to William Ruth an instrument in writing, being like in all respects to the instrument so as aforesaid delivered to James H. Gessner, conveying unto the said William Ruth an undivided one-twentieth interest in the said contract.

III. That the said parties owning said several interests prosecuted the work of making and deliveridg ties, timber, and lumber, so as aforesaid contracted to be delivered, and did, between the 20th day of November, 1867, and the 1st day of January, 1869, deliver to the said defendants, Durant and others, trustees as aforesaid, one million ties and feet of lumber and timber, for which the said trustees became indebted unto the said parties so associated in the performance of the contract first above mentioned, on account of which indebtedness the said trustees have paid to the said associates large sums of money, from time to time, as the work under said contract progressed.

291 IV. That a profit was realized by said associates for the work done and materials furnished under said million-tie contract, and ni the business connected therewith.

That no account of the items of such business, or of the receipts, payments, and profits made therein, has been made and stated between the parties, so as to enable the undersigned to find specifically the amount of the profits of said business done under said million-tie contract.

V. That the said sums of money so received from said trustees on account of such indebtedness came into the possession of the defendants James W. Davis and James H. Gessner, two of said associates, and was by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and material specified in the contract set out in schedules A, B, & C, annexed to the complaint.

That for such work and materials furnished the said trustees became and are indebted to the said James W. Davis and James H. Gessner.

VI. That the sums of money received from the trustees on account of the first above-mentioned contract, and belonging to the first above-mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner, without the knowledge, privity, or assent or concurrence of the plaintiffs, or of any of said associates besides said Davis and Gessner, and that none of said associates except said Davis were associated in the said business done and transacted by Davis and Gessner outside of said first-named contract, or were in any wise interested therein as partners or participants in the profits or benefits thereof.

VII. That all of the said work so done by the said Davis and Gessner outside of and not relating to the contract set forth in the complaint in schedules A, B, & C, and known as the million-tie contract, was

292 done along the line of the Union Pacific Railroad at points westward of the point known as Elk Mountain; and that the business so done at points west of Elk Mountain was done by the said James W. Davis and James H. Gessner in the name and under the style sometimes of "James W. Davis & Associates" and sometimes in the name and under the style of "James W. Davis, Trustee."

VIII. That the work done and performed and materials furnished in the execution of the contract set out in complaint in schedules A, B, & C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific Railroad at points eastward of a point known as Elk Mountain.

That in the execution of said million-tie contract all subcontracts for making or delivering ties, purchases of goods, merchandise, and materials, payments to employés for labor, and receipts given for work, labor, and materials were made, done, and given, sometimes under the style of "Davis, Sprague & Company" and sometimes that of "J. W. Davis and Associates."

IX. The accounts kept by said trustees with said associates for work done, materials furnished, under said several contracts, as well east as west of Elk Mountain, were kept in the name of J. W. Davis and Associates, and payments for such work and materials were made by said trustees by checks or drafts running in the name of said J. W. Davis and Associates.

X. That no articles or agreement of partnership were ever made between the parties in interest in the said contract, known as the million-tie contract, nor between the said James W. Davis and James H. Gessner in relation to the work done west of Elk Mountain.

XI. That the parties so as aforesaid associated in interest in the million-tie contract became and were the owners of a large quantity of ties,
293 lumber, and timber, and other materials in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

XII. There is no proof yet introduced before me that James W. Davis has fraudulently invested the assets of Davis, Sprague & Co. in his own name, or in the name of his wife, or that he is wasting and squandering the property and assets of said firm of Davis, Sprague & Co., or of the firm of J. W. Davis & Associates.

I find, as conclusions of law:

I. That an account should be made and stated by and between James W. Davis and James H. Gessner, on the one hand, and William F. Durant, Mordecai B. Sprague, William Ruth, Pierson S. Mattox, T. P. Richards, and H. C. Crane, trustees, etc., on the other hand, of the business receipts, payments, and profits of the work done and materials furnished under the million-tie contract, or otherwise, by said associates, and of the sum or sums of money received from, or still due and owing by, the said trustees on account of such work and materials, and of the amount thereof used and appropriated by said Davis and Gessner, for which they are indebted to their said associates.

II. That the sum of the indebtedness of the said T. C. Durant and others, trustees, etc., as aforesaid, or of the Union Pacific Railway Co., to the said James W. Davis and James H. Gessner, for work done and materials furnished by them outside and independent of the million-tie contract, and which shall come into the hands of the receiver heretofore appointed in this action, should be applied to the payment of the claims which shall be

allowed and reported by me in favor of the creditors of the said James W. Davis and James H. Gessner, and embraced in the schedule of
294 claims, so to be hereafter reported by me, as properly to be satisfied out of that part of the fund which shall so come into the hands of the receiver herein, applicable to the work done west of Elk Mountain and not embraced in or covered by the million-tie contract; including, also, whatever sum the said James W. Davis and James H. Gessner, or either of them, may, upon an accounting, be found to be indebted to their associates in the million-tie contract.

And if there shall not be enough to pay such amount so due on such accounting from Davis and Gessner, or either of them, to their said associates and such creditors as are found and reported to be justly chargeable to this fund in full, that the same be paid pro rata, share and share alike, so far as the said fund will pay and discharge the same; and if there remain any residue after payment of such creditors and such amount as shall be found due their said associates from the said Davis and Gessner as aforesaid, that the said residue be paid to the said James W. Davis and James H. Gessner, according to their several interests.

III. That the sum of the indebtedness of the said T. C. Durant and other trustees, etc., as aforesaid, or of the Union Pacific Railroad Company to the said associates in the million-tie contract for work done and material furnished thereunder or otherwise, and which shall come into the hands of the said receiver, should be applied to the payment of such claims as shall be allowed and reported as properly chargeable to the fund belonging to the associates in the million-tie contract, and which shall come into the hands of the receiver herein, from the trustees aforesaid, the Union Pacific Railroad Company, or otherwise, belonging or relating to the said million-tie contract or to the parties interested therein.

And if the said fund should not be sufficient to pay said claim in full, that the same should be distributed to and among said creditors entitled thereto proportionally to the amount of their several claims, the
295 residue and remainder thereof, if any, to be paid over unto the said association, according to the proportion of their respective interests.

New York, Nov. 9, 1871.

AMASA A. REDFIELD, *Referee.*

(Endorsed:) "Filed November 17, 1871."

(A copy.)
[L. S.]

CHAS. E. LOEW, *Clerk.*

296 At a special term (chambers) of the supreme court, held at the court-house, in the new city hall in the city of New York, on the 11th day of November, A. D. 1870,

Present, Hon. John R. Brady, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson Mattox, plaintiffs,
against
JAMES W. DAVIS, JAMES A. GESSNER, Timothy P. Richards, William Ruth, John Doe, Richard Roe, and Susan Doe, composing, with the plaintiffs, the firm of Davis, Sprague & Company; James W. Davis, James H. Gessner, John Brown, William Brown, and Sarah Brown, copartners, composing the firm of J. W. Davis & Associates; Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, and Elizabeth Davis, wife of James W. Davis, defendants.

On motion of Clark Bell, esq., attorney and counsel for the plaintiffs, and after hearing D. W. Gillett, esq., of counsel for the defendants James W. Davis and James H. Gessner, and Messrs. Hammond and Pomeroy, of counsel for the defendants T. C. Durant, John Duff, Sidney Dillon, Benj. E. Bates, H. S. McComb, Cornelius S. Bushnell and Oliver Ames, all parties that have appeared consenting—

297 It is ordered, that all persons, parties, and corporations having claims against the firms of "Davis Sprague & Company," and "James W. Davis and Associates," or either or both of said firms, present the same, together with their proofs in support of the validity thereof, to A. A. Redfield, esq., the referee heretofore appointed in this action, at his office, No. 20 Nassau street, in the city of New York, within twenty days from and after the service upon them, respectively, of a copy of this order.

And it is further ordered, that any claim against either of said firms, not so presented within the time above limited, shall be excluded from participation in the fund in question in this action, and from all funds that may come into the hands of the receiver herein.

And it is further ordered, that the said referee take proof in support of and adversely to the validity of any and all claims so submitted to him, and determine upon the validity thereof, and the amount justly due for principal and interest thereon, and from time to time report, as shall seem convenient, to him said claims, together with his findings of law and of fact thereon.

And it is further ordered, that service of this order may be made upon the several parties, persons, or corporations having claims or alleging demands against said firms, or either of them, as follows:

1. By delivering to them personally a copy of this order, and leaving the same with them.

2. By leaving a true copy thereof at the place of residence of said person or persons, with some person found at such place of residence, or at the office of such corporation with some officer, director, clerk, or employee of such corporation, and that said service, whether personally or by copy, left at residence or office, may be served without the State of New York, if the said person or coporation to be served reside out of this State, or

298 3. By publishing this order once in each week successively in the following newspapers, to wit:

The Omaha Herald, a paper published in Omaha, Nebraska.

The Laramie Sentinel, a paper published at Laramie, in the Territory of Wyoming, and in the New York Times, a paper published in the city of New York, for the space of seven weeks.

And it is further ordered that the publication so made shall be deemed full and sufficient service upon all such persons and corporations so alleging claims against both or either of said firms. And that all claims whatsoever not so presented by any person or corporation within twenty days after publication of this order has been duly made as herein provided shall be excluded from all participation in the fund in question in this action, and from all funds that may come into the hands of the receiver.

A true copy.

CHAS. E. LOEW, *Clerk.*

299 New York supreme court.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
against
JAMES W. DAVIS, TIMOTHY P. RICHARDS, William Ruth, Thomas C. Durant and others, defendants.

To the supreme court of the State of New York:

The undersigned respectfully reports to this court that, by an order of this court, bearing date the 2d day of November, 1870, the undersigned was appointed referee, among other things to take and state an account of all claims justly chargeable upon the fund in question in this action, as well in favor of any and all of the parties hereto as also in favor of creditors of the respective copartnerships named in the pleadings.

That, by an order of this court, bearing date the 11th day of November, 1870, among other things then ordered, all persons, parties, and corporations having claims against the said respective firms, or either or both of them, were required to present the same, together with their proofs in support of the vali'ity thereof to me, the undersigned referee, as aforesaid, of which a printed copy is hereto attached.

I hereby report that I have been attended by the parties hereto, and by their respective counsel, and by the following named creditors in person, or by counsel, and have duly considered the allegations and proofs of the parties, and of the said creditors and their counsel.

I find, as matters of fact:

I. That the following named persons and firms have duly
300 presented and proved before me the claims in the amounts as hereinafter set opposite their respective names, and that the said claims and each of them are justly chargeable upon that part of the fund in this action which may be found to be due and owing from the trustees, defendants in this action, to James W. Davis and James H. Gessner for all work, labor, and materials done, and performed and rendered outside of and not relating to the million-tie contract, or which shall in anywise come into the hands of the receiver herein pertaining or relating to the work done west of Elk Mountain, and not relating to, or embraced in, or covered by the million-tie contract, so called:

First National Bank Omaha:		
	c/c Colorado Nat'l B'k	$102 24
	" Geo. D. Oaks	133 00
	" Barton & Bartholow	7,063 20
	" C. H. Peck	50 00
	" A. Pollard & Co	100 00
	M. G. Town	2,049 81
	William A. Carter	5,211 12
	George W. Frost	294 50
	C. W. Harrington	294 08
	O. Haley	600 00
	Samuel House	3,046 21
	Lowry & Upton	6,341 58
	Patrick Doran	2,388 44
	Philip Mandell	3,285 25
	J. W. Collins	2,197 80
	John Keane	616 83
	S. Lathrop	1,650 00
	C. W. Burt	5,259 67
	J. E. Boyd	1,000 00
	L. R. Wright	1,904 67
	Geo. G. Graham	2,302 42
	E. W. Winters	1,977 09
	G. H. & J. S. Collins	4,149 02
	S. F. Mitchells	294 75
	Iler & Co	269 56
	Thomas Mulloy	1,000 00
301	Stephens & Wilcox	$491 71
	J. W. Myers	4,354 20
	Howell Smith	1,000 00
Kountze Bros. & Co.:		
	c/c Bussard & Hogeboom	222 20
	" A. M. Hoffman	400 00
	" J. Richards	355 00
	Walker Bros	294 00
	T. C. Brush	1,000 00
	E. Creighton	4,769 53
	Posey S. Wilson	200 00
	W. W. Corlette	750 00
	W. R. Steele	700 00
	J. S. & D. T. Casement	364 09
	W. H. Watson	96 00
	Gave Rolston	66 25
	Freeman & Hoffman	317 85
	J. C. Droguintum	899 11
	C. B. Sprague	1,345 20
	Hurford & Schrever	747 36
	Loveland Mills	2,436 25
	Wolcott & Co	217 4'
	M. F. Churchill	400 45
	Nye, Colson & Co	312 10

Poland & Patrick			462 44
P. Ramsey & Son			329 10
Geo. G. Wedell			348 48
Wm. Ruth			1,966 38
B. D. Crary			3,390 26
Henry J. Rogers:			
	C'k & % T. C. Brush		99 35
	" " F. Haggerty		388 45
	D'ft " H. H. J. Rogers & Co		584 52
	" " W. W. Corlett		250 00
	" " J. H. Gesner		150 00
	" " Sam'l Hause		100 00
	" " Wm. P. Smith		189 80
	" " J. W. McIntyre		200 00
	" " S. K. Dye		311 00
302	Def't % J. M. Mansfield		$638 96
	" " H. Robinson		157 05
	" " Thos. B. Higgins		295 06
	" " Daniel McQuillan		300 00
	" " M. V. Lee		128 55
	" " Daniel McQuillan		314 13
	" " C. A. Henry		888 38
	" " A. H. Huvett		71 69
	" " Wyatt & Jones		1,038 02
	" " H. J. Rogers & Co		232 80
	" " J. W. Hutchins		8 55
Bank account			1,583 99
Mark Parish %			133 00
J. W. Young & Co. %			5,376 00
P. J. Farwell			141 75
John Brown			25 00
C. Christopher			2,158 76
Hussey, Dahler & Co			5,524 00
B. F. Bunker			2,444 44
A. C. Amer			600 00
Coleman fund			5,250 00
	M. Hellman & Co	$3,104 05	
	Wm. Ruth	3,018 00	
	Alex. Strong & Co	1,590 85	
H. J. Rogers:			
	D'f't R. S. Van Tassel		2,188 54

II. That the following-named persons and firms have duly presented and proved before me claims in the amounts set opposite their names, respectively, and that the same are and each of them is properly and justly chargeable upon that part of the fund in this action which may be found to be due and owing from the trustees aforesaid to the said parties so associated in the million-tie contract, or which shall in any way come into the

hands of the receiver herein pertaining, belonging, or relating to the million-tie contract, or to the parties interested therein:

John McCormick & Co	$6,845	80
W. W. Whitney	84	00
303 Bishop Sanborn	802	50
James M. Sherrod	339	61
A. G. Lathrop & Co	5,237	16
Isaac L. Smith	1,689	87
Thomas R. Gibson & Co	746	38
Stewart & Haas	292	13
Nelson Wood	85	50
Damon, Thomas & Lewis	829	24
Crerar, Adams & Co	248	50
James Brown	2,303	82
Alexander Strong & Co	1,497	00
John Snodgrass	1,862	50
Gilbert Hubbard & Co	1,474	60
Ben. Van Vlack	50	00
Hall, Kimbark & Co	96	00
B. F. Bunker	2,766	76
C. Christopher	7,810	36
Harriet Knapp	650	00
A. C. Amer	2,028	62
C. L. Shotwell	1,490	65
A. M. Burnham	2,047	43

III. That those claims so embraced in clause 1 of this report are not properly chargeable to the parties associated in the million-tie contract, or to any fund that may come into the hands of the receiver herein belonging, relating, or pertaining to the million-tie contract.

I find, as conclusions of law:

1. That the associates in the million-tie contract, viz: William F. Durant, Mordecai B. Sprague, Pierson S. Mattox, William Ruth, Timothy P. Richards, and Henry C. Crane, trustee, &c., are not liable for the claims embraced in clsuae 1 of this report.

2. That such funds as shall be found due or come into the hands of the receiver herein from the trustees, or otherwise relating or pertaining to the work done west of Elk Mountain, and not embraced in or covered
304 by the million-tie contract, should be applied to the payment of the claims so hereinbefore embraced in clause 1 hereof, together with such sum as shall be found upon an accounting to be due from the said James W. Davis and James H. Gessner, or either of them, to their said associates in the million-tie contract, equally and pro rata, in case there should not be enough to pay all of said claims and said sum so to be found due upon such accounting; but in case there should be enough to pay the same in full, then the residue to be paid to the said James W. Davis and James H. Gessner, according to their respective interests.

3. That such fund as should be found due, or as should come into the hands of the receiver herein from the trustees, or otherwise relating to or in any wise belonging to the million-tie contract, or to the parties associated therein, should be applied to the payment of the claims embraced and

enumerated in clause 2 of this report, equally and pro rata, in case there should not be sufficient to pay the same in full, and the residue, after paying the same in full, should be divided among the parties so associated in the million-tie contract, according to their respective interests, after an accounting shall be had among the several associates therein to and with each other.

Dated New York, November 16, 1871.

AMASA A. REDFIELD,
Referee.

305 N. Y. supreme court.

WILLIAM F. DURANT AND OTHERS
ag'st
JAMES W. DAVIS AND OTHERS.

To the supreme court of the State of New York:

The undersigned, appointed by this court by order made and entered November 2d, 1870, a referee to hear and determine this action and the issues therein; and by another order, made and entered October 17th, 1871, appointed referee to hear, determine, and report upon the amount due or to grow due to the parties herein, or to either of them, from the defendants Sidney Dillon and others, as trustees, &c., on account of the matters in this action alleged, having duly considered the allegations and proofs of the parties on the issue referred by the last above-mentioned order, and having heard Clark Bell, esq., for the plaintiffs; James M. Woolworth, Daniel W. Gillett, and James W. Davis, esqs., for the defendants Davis & Gessner and Eugene H. Pomeroy and Andrew J. Poppleton, esqs., for the defendants the trustees, &c., reports to the courts as follows;

I find as matters of fact:

First. That prior to the commencement of this action, the plaintiffs and the defendants James W. Davis and James H. Gessner were jointly interested in the performance of the contract set forth in the complaint, dated November 19, 1867, and known and designated throughout this investigation as the "million-tie contract," and made an exhibit herein, marked Y. That all the ties contracted for by that contract were duly de-
306 livered to the defendants the trustees, &c., and paid for by said trustees as alleged in the complaint.

That the defendants James W. Davis and James H. Gessner, composing the firm of James W. Davis and Associates, under a subsequent parol contract with the defendants the trustees, &c., cut, sawed, and prepared for use a large quantity of railroad ties, in the Territory of Wyoming, being located, at the time of the commencement of this action, at different points along the line of the Union Pacific Railroad and in the woods contiguous thereto, in said Territory.

Second. That in the month of September, 1870, in pursuance of an understanding between said two contracting parties under the million-tie contract, and the subsequent parol contract with the trustees, and with the view of a sale and delivery to said trustees of the said ties by the said contracting parties, and of ascertaining their quality, quantity, and location, the said ties so furnished and procured by James W. Davis and Associates aforesaid were counted and inspected, and their number, quality and loca-

tion were reported in writing by three persons mutually agreed upon by all the parties litigant as well as by said trustees.

That upon said report and inspection as a basis, the said parties litigant, by their agent and attorney in fact, and said trustees entered into an agreement in writing, dated, signed, and delivered on the 26th day of October, 1870, of which the following is a copy:

Memorandum of an agreement made this 26th day of October, 1870, between Oliver Ames, John Duff, Sidney Dillon, C. S. Bushnell, Thomas C. Durant, Benjamin E. Bates, and H. S. McComb, trustees for building the Union Pacific Railroad, of the one part, and Davis, Sprague & Company, James W. Davis and Associates, James W. Davis, and M. B. Sprague.

It is agreed between the parties hereto as follows:

307 I. The parties of the second part shall pay off and discharge all liens on the ties, lumber, and other material delivered by them to said trustees on the 6th day of September, 1870; and

II. For $328,936.15, to be paid as hereinafter provided, save certain sums already paid, to be ascertained, to acknowledge full payment and satisfaction, and to execute all necessary acquittances, discharges, and satisfactions of all and each and every the claims and demands, had, claimed, or allowed by said parties of the second part, or any or either of them, against said trustees and the Union Pacific Railroad Company, and to consent to the entry in a certain cause pending in the supreme court of New York between W. F. Durant and others, plaintiffs, and James W. Davis and others, defendants, all orders to carry out the agreement and all the stipulations thereof.

III. From said sum of $328,936.15 shall be deducted such sums as said trustees have paid Davis and Associates, and Davis, Sprague & Company and James W. Davis, over above what was due to them. Such overpayments to be ascertained by books of said trustees.

IV. Said trustees may further retain such further sum out of said $328,936.15 as is necessary to protect them from liability on two trustee processes heretofore issued out of the courts of Massachusetts, and served on said trustees, in two several cases pending in said courts against said Davis and Associates, until their liability is discharged.

V. Said trustees shall not be called upon to pay any part of said $328,936.15 until sufficient ties have been delivered, discharged of liens, to cover their overpayments.

VI. Said payments shall be made as the same shall be ordered by said court in said action after all liens on parcels of 75,000 ties shall be successively discharged, and after the retention and deduction aforesaid, and after the delivery of ties sufficient to cover overpayments aforesaid.

308 VII. If the books of said trustees shall show that the amount, or part of the amount, of what is known as Black Hill account has been twice charged against Davis and Associates, the error shall be corrected notwithstanding this agreement.

VIII. The agreement may be delivered to the receiver appointed in the action aforesaid, and the stipulations therein become applicable to him in

all respects as if he were the party thereto of the second part upon his notifying said parties of the first part of his acceptance thereof.

Interlined before signing.

DAVIS, SPRAGUE & CO.,
JAMES W. DAVIS AND ASSOCIATES,
JAMES W. DAVIS,
M. B. SPRAGUE,
By J. M. WOOLWORTH,
Their Attorney in Fact.
JOHN DUFF,
THOMAS C. DURANT,
C. S. BUSHNELL,
Trustees.

This expresses the terms of the settlement we have agreed to, if in proper and legal form.

JOHN DUFF.
SIDNEY DILLON.
C. S. BUSHNELL.
T. C. DURANT.

The form seems to be well enough.

S. BARTLETT.

Third. That it was the intention of all the parties in interest to finally settle and fully discharge all matters of difference between them arising out of the respective contracts, whether as firms or as individuals connected therewith; and the said trustees agreed, in consideration of the delivery to them of 188,300 first class and 33,141 second class railroad ties, and of a final settlement and liquidation of all matters and dif-
309 ference between them, to pay therefor the sum of $328,936.15, less such sum as should on examination be found then due to the said trustees by James W. Davis and Associates for overpayments on past accounts.

Fourth. That said James W. Davis and Associates failed and neglected to deliver the said trustees 96,515 first-class ties and 15,344 second-class ties, inspected and reported as aforesaid, and contemplated by said contract to be delivered to the trustees.

Fifth. That at and before the execution and delivery of the said contract neither of the parties litigant had any title to such aforesaid ties, the same having been levied upon as the property of James W. Davis and Associates, under and by virtue of executions issued against the property of said J. W. Davis and Associates, and duly sold by the sheriff to whom said executions were issued, and delivered to third persons, or otherwise owned and held by third persons, under claim of ownership. That before and at the date of said contract the firm of Meyer & Co., creditors of said J. W. Davis and Associates, had a lien upon 22,786 of said ties, which lien the said James W. Davis and Associates have wholly neglected to discharge, as required by the terms of said contract.

Sixth. That James W. Davis and Associates being the owners of and having good title thereto, had duly delivered all the ties made and prepared under their parol contracts agreed by them to be delivered to the said trustees except the aforesaid 111,859 ties.

Seventh. That the value of the said 111,859 ties so not delivered, as fixed by the parties at the time of the execution of said contract, was 95 cents for first-class ties and 83 cents apiece for second-class ties.

That the total value or price of the said 111,359 ties not delivered as aforesaid is $104,424.77, which sum should be deducted from the aforesaid sum of $328,936.15 mentioned in said contract.

310 Eighth. That on the day of the date of said contract said J. W. Davis and Associates were indebted, as shown by their account filed in these proceedings, to the said trustees, for overpayments on past accounts, in the sum of $130,333.17.

That since the day of the date of said contract said trustees have paid on account, at the time agreed to be paid by them under said October contract, the sum of $33,500 making altogether the sum of $163,833.17, which, together with aforesaid sum of $104,424.77, should be deducted from the sum of $328,936.15 named in the October contract aforesaid, leaving a balance of $60,673.21.

Ninth. That the said trustees, in the account known as the Black Hills account, erroneously charged James W. Davis and Associates with the sum of $3,560, which sum should be added to the above-stated balance, making the aggregate sum of $64,238.21, which is due from said trustees to said firm of James W. Davis and Associates.

Tenth. That on the 1st day of September, 1870, the said trustees were served with two certain trustee processes issued out of the court of the State of Massachusetts, in actions against J. W. Davis and Associates, one for the sum of two hundred thousand dollars, and one for the sum of fifty-nine thousand dollars.

That on the day of such service the said trustees were not indebted to the said J. W. Davis and Associates in any sum whatever.

That the plaintiffs suing out the said trustee processes for the sum of $200,000 are the same persons as the plaintiffs in this action.

And I find as conclusions of law:

First. That the defendants, Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific

311 Railroad, are indebted, under the contract of settlement aforesaid, to James W. Davis and Associates in the sum of $64,238.21, for which sum the said James W. Davis and Associates are entitled to judgment against trustees in this action.

Second. That the said trustee processes are inoperative and constitute no lien upon said indebtedness so as to make it necessary for said trustees to withhold any part of said sum to protect themselves from liability until the discharge of such processes.

Third. The said trustees should be decreed to pay said sum forthwith to the receiver heretofore appointed in this action, and such payment should be decreed to be a release to said trustees of all liability on their part by reason of the service upon them of the said trustee processes in the action for the recovery of $200,000.

Fourth. That the costs of this reference should be paid out of the fund, and in my judgment the taxed costs of each party should likewise be paid out of the fund.

N. Y., March 14th, 1872.

AMASA A. REDFIELD.

312 At a special term of the supreme court of the State of New York, held at the chambers thereof, in the city hall court-house, in the city of New York, on the 17th day of January, 1873.

Present, Hon. George C. Barrett, justice.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE and Pierson S. Mattox, plaintiffs,
agst.
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, Henry C. Crane (trustee for W. D. Train), William Ruth, and others, defendants.

On reading and filing notice of motion, and proof being made of service thereof on the several attorneys entitled to notice on the report of referee, and all the pleadings and proceedings herein, on motion of plaintiffs' attorney, after hearing Clark Bell, esq., attorney and counsel for plaintiffs, and D. W. Gillett, esq., of counsel for defendants Davis and Gessner, no one else appearing, it is

Ordered, that the report of the referee, A. A. Redfield, esq., bearing date November 9th, 1871, and filed with the clerk of this court on the 17th November, 1871, be, and the same hereby is, in all things duly confirmed.

A copy.

CHAS. E. LOEW, *Clerk.*

(Endorsed:) Filed January 18th, 1873.

313 N. Y. supreme court.

WILLIAM F. DURANT ET AL.
ag'st
JAMES W. DAVIS, ET AL.

Certified copy order confirming report of referee of Nov. 9, 1871.

CLARK BELL,
Attorney for Plaintiffs, 20 *Nassau st., N. Y.*

Please take notice, that an order, of which the within is a copy, has been duly entered in the office of the clerk of the city and county of New York this day.

Dated January 13th, 1873.

CLARK BELL, *Pl'ffs' Att'y.*

To J. M. WOOLWORTH,
Att'y for Davis & Gessner.
HAMMOND & POMEROY,
Att'y for Trustee.
E. T. BARTLETT,
Att'y for H. C. Crane, Trustee.

314 Supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
ag'st
TIMOTHY P. RICHARDS, JAMES W. DAVIS, WILLiam Ruth, Thomas C. Durant, et al.

To the supreme court of the State of New York:

The undersigned respectfully reports to this court that, by an order of

this court, bearing date the second day of November, 1870, the undersigned was appointed sole referee herein, to hear and determine this action, and to take and state an account of all claims justly chargeable upon the fund in question in this action, as well in favor of any and all the parties hereto as also in favor of creditors of the respective copartnerships named in the pleadings, and of each and all of the allegations of the complaint.

That by an order of this court, bearing date the 11th day of November, 1870, all persons, parties, and corporations having claims against the said respective firms, or either or both of them, were required to present the same, together with their proofs in support of the validity thereof, to me, the undersigned referee, as aforesaid; and by the same order I was required to take proof in support of and adversely to the validity of
315 any and all claims so submitted to me, and determine the validity of the same, and the amount justly due for principal and interest thereon, and make report thereof.

That by an order of this court, made and entered October 17th, 1871, I was appointed referee to hear, and determine, and report upon the amount due and to grow due to the parties herein, or to either of them, from the defendants, Sidney Dillon and others, as trustees, etc., on account of the matters in this action alleged.

That in pursuance of said several orders of reference, I have heretofore reported certain facts and conclusions of law to this court, by three several reports, dated, respectively, November 9th, 1871; November 16th, 1871, and March 1 th, 1872.

I hereby report that I have been attended by the parties and their respective counsel, and have duly considered the proofs and allegations of the respective parties, and I now make this my final report in this action.

I find, as matters of fact:

I. The several matters of fact fully set forth in the three reports aforesaid, reference being hereby made to the same.

II. That the profits realized by the associates under the million-tie contract, and which came into the possession of James W. Davis and James H. Gessner, from the trustees, etc., and amounted to two hundred and twenty-five thousand dollars ($225,000).

III. That there is due from said James W. Davis and James H. Gessner to their associates in the million-tie contract the sum of two hundred and twenty-five thousand dollars ($225,000), being the profits of said contract expended and disbursed by said Davis and Gessner, as heretofore found, in work done and materials furnished west of Elk Mountain, and outside of said million-tie contract.

IV. That there should be added to the list of creditors set forth
316 in clause 1 of my report, dated November 16th, 1871, being the creditors of the work west of Elk Mountain and outside of the million-tie contract, the name of Augustus Kountze, there being due him the following amounts and interest, viz:

Certain note proved, dated				Mar.	8,	1870	$675 00
"	"	"	"	Apl.	25,	"	150 00
"	"	"	"	May	19,	"	400 00
"	"	"	"	June	1,	"	175 00
"	"	"	"	Feb.	5,	"	1,500 00
"	"	"	"	Feb.	8,	"	500 00

"	"	"	"	Feb. 18,	"	.....	600 00
"	"	"	"	Mar. 4,	"	.....	500 00
Book account.....							384 80
Total.....							$4,884 80

The foregoing amounts to be considered and treated as included in my said report of November 16th, 1871, clause 1 thereof.

I find, as conclusions of law:

First. James W. Davis and James H. Gessner are indebted to their associates in the million-tie contract in the sum of two hundred and twenty-five thousand dollars ($225,000), being the profits of said contract, expended and disbursed by said Davis and Gessner in work done and materials furnished west of Elk Mountain and outside of said million-tie contract, for which sum said associates in said million-tie contract are entitled to judgment against said James W. Davis and James H. Gessner, defendants in this action.

Second. That said sum, or such part of it as may be paid, should go into the hands of the receiver in this action, to be disposed of by him as heretofore indicated by me in my previous reports herein referred to.

Dated New York City, June 7th, 1873.

AMASA A. REDFIELD, *Referee.*

(Copy.)

317 Supreme court.

WILLIAM F. DURANT AND OTHERS
vs.
JAMES W. DAVIS AND OTHERS.

The undersigned, the referee in the above-entitled action, certifies, at the request of the plaintiffs' attorney, that in his opinion the said cause is a difficult and extraordinary case, within the meaning of § 309 of the code. There have been not less than 200 meetings before the referee. There have been a very large number of claims of creditors presented and litigated, requiring examination by the plaintiffs' attorney, a very considerable portion of them requiring distinct consideration, as will appear from my report of November 16, 1871. The subject-matter of this litigation, besides the matter of the accounting between the parties exceeded in amount one million of dollars.

Dated New York, June 20, 1873.

AMASA A. REDFIELD, *Referee.*

318 At a special term of the supreme court of the State of New York, held at the chambers thereof, in the new court-house, in the city of New York, on the 21st day of June, 1873.

Pesent, Hon. D. P. Ingraham, justice.

WILLIAM F. DURANT ET EL., PLAINTIFFS,
ag'st
JAMES W. DAVIS, JAMES H. GESSNER, ET AL., DEFENDANTS.

This cause having been referred to Amasa A. Redfield, esq., to hear and

determine the same, and the said referee having made several reports herein, dated, respectively, November 9th, 1871, November 16th, 1871, and March 14th, 1872, and the same having been duly filed, and the said referee having made his final report herein, dated June 7th, 1873, and the same having been also duly filed:

Now, on motion of Clark Bell, attorney for the plaintiffs, after hearing D. W. Gillett, of counsel for Davis and Gessner, and L. L. Kellogg, esq., of counsel for the trustees, and Wm. E. Stiger, esq., of counsel for Henry J. Rogers,

Ordered, that a final decree be entered in this action as follows, viz:

It is ordered, adjudged, and decreed that the said reports be, and that the same are in all respects hereby, ratified and confirmed; and it is further adjudged, ordered, and decreed that on or about the 19th or 20th days of November, 1867, and the 3d day of December, 1867, the defendant James W. Davis, at the city of New York, made a contract, in writing, with the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John
319 Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, &c., parties of the second part, for the delivery by the said James W. Davis and his associates unto the said parties of the second part of a large quantity of railroad ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices, and upon certain terms and conditions, a copy of which contract is annexed to the complaint in this action.

That subsequently, and at various times between the 20th day of November, 1867, and the 20th day of November, 1868, the said Davis, for a valuable consideration to him paid, assigned proportionate interests in the profits and business of the said contract to, and associated with himself in the performance of said contract, certain parties, to wit, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train.

That said assignments are fully set forth in the report of the referee herein, bearing date November 9th, 1871.

That the said parties owning said several interests prosecuted the work of making and delivering the ties, timber, and lumber so as aforesaid contracted to be delivered, and did, between the 20th day of November, 1867, and the 1st day of January, 1869, deliver to the said defendants Durant and others, trustees as aforesaid, one million ties and feet of lumber and timber, for which the said trustees became indebted to the said parties so associated in the performance of the contract first above mentioned, on account of which indebtedness the said trustees have paid to the said associates large sums of money from time to time, as the work under said contracts progressed.

That a profit was realized by said associates for the work done and materials furnished under said million-tie contract, and in the business connected therewith, of the sum of two hundred and twenty-five thousand dollars ($225,000).

That the said sums of money so received from said trustees on account of such indebtedness came into the possession of the defendants, James
320 W. Davis and James H. Gessner, two of said associates, and were by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad

ties, timber, and lumber, exclusive of and unconnected with the work and material specified in the contract set out in Schedules A, B, and C, annexed to the complaint herein, and known as the million-tie contract.

That for such work done and materials furnished the said trustees became and are indebted unto the said James W. Davis and James H. Gessner.

That the sums of money received from the trustees on account of the first above mentioned contract, and belonging to the first above mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of the plaintiffs, or any of said associates, besides said Davis and Gessner, and that none of said associates, except Davis and Gessner, were associated in said business done and transacted by Davis and Gessner outside of said first-named contract, or were in any wise interested therein as partners or participants in the profits or benefits thereof.

That all of the said work so done by the said Davis and Gessner outside of and not relating to the contract set forth in the complaint in Schedules A, B, and C, and known as the million-tie contract, was done along the line of the Union Pacific Railroad at points westward of the point known as Elk Mountain, and that the business so done at the points west of Elk Mountain was done by the said James W. Davis and James H. Gessner, in the name and under the style sometimes of "James W. Davis and Associates," and sometimes in the name and under the style of "James W. Davis, trustee."

That the work done and performed, and materials furnished in the execution of the contract set out in the complaint in Schedules A, B, and C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific Rail-
321 road, at points eastward of a point known as Elk Mountain, and that their relation was as is set out in the certificates set forth in said report.

That no partnership existed at any time, and no articles or agreement of partnership were ever made between the parties in interest in the said contract, known as the million-tie contract. That the transaction was a special venture, in which the various parties held respectively the several interests or shares mentioned and specified in the report of the referee herein, dated November 9th, 1871, and that no articles of partnership were ever made between the said James W. Davis and James H. Gessner in relation to the work done west of Elk Mountain.

That the parties so as aforesaid associated in interest in the million-tie contract became and were the owners of a large quantity of ties, lumber, and timber, and other materials, in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

It is further adjudged that the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, are indebted, under the contract of settlement referred to

in the report of the referee herein, bearing date March 14, 1872, to James W. Davis and his said associates, in the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872; the said sum being the amount due from said trustees to said James W. Davis and said associates, or to any of them individually, arising out of said million-tie contract or the second contract for work done and materials furnished west of Elk Mountain. And that such payment by the said trustees shall be a release to them of all liability on their part by reason of the services upon them of the said trustee process.

322 It is further adjudged that said James W. Davis and his said associates do recover of the said trustees the said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14, 1872, and that the same be paid into the hands of the receiver heretofore appointed in this action, to be disbursed by him as hereinafter directed.

It is further adjudged that there is due to the associates of said Davis and Gessner in the million-tie contract, and that they do recover from James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000.00), being the amount of profits realized by said associates for the work done and materials furnished under said million-tie contract, and in the business connected therewith, and used and expended by said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of any of the associates in said million-tie contract, except Davis and Gessner, in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and materials done and furnished under the million-tie contract.

It is further adjudged that all persons, parties, and corporations named in clauses one and two of the report of the referee herein, dated November 16th, 1871, having appeared, filed their claims and proved the same before the referee, and the same having been adjusted and reported by the said referee, shall be considered as adjudicated upon as to the amounts claimed by them respectively.

That those claims so embraced in clause one of said report of November 16th, 1871, are not chargeable to the parties associated in the million-tie contract, or to any fund that may come into the hands of the receiver herein belonging to said contract.

It is further adjudged that said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), and interest from March 14th, 1872, found due from said trustees to James W. Davis and

323 Associates, and to be paid into the hands of the receiver herein, shall be disbursed by the said receiver as follows, viz:

1st. He shall pay the fees of the referee herein.

2d. The costs of the parties to this suit to be taxed by the clerk of this court, and that the referee herein report what sum would be a proper allowance for counsel fee, and additional allowance, under § 309 of the Code, to plaintiffs' attorney, to the attorney and counsel for Davis and Gessner, and to the attorney for the trustees, to be paid out of said fund.

3d. The balance of said fund to be distributed pro rata among the persons, parties, and corporations named as creditors in clause one of the re-

port of the referee herein, dated November 16th, 1871, and the associates of James W. Davis under the million-tie contract.

The basis of calculation being the amounts found due said persons, parties, and corporations respectively in clause one of said report of November 16th, 1871, and the amount found due said associates in the million-tie contract, as hereinbefore set forth, viz., $225,000.

It is further adjudged that the receiver herein shall retain possession of the amount or share due to the associates in the million-tie contract, as last above provided, and distribute the same pro rata among the persons, parties, and corporations mentioned in clause two of the report of the referee herein, dated November 16th, 1871.

Enter.

(Signed) D. P. I.

(Endorsed:) "C. E. L."

324 Supreme court.

WILLIAM F. DURANT AND OTHERS
against
JAMES W. DAVIS AND OTHERS.

To the supreme court:

The undersigned, to whom it was referred to report what sum would be a proper allowance for counsel fees and additional allowance under § 309 of the code to the plaintiffs' attorney, to the attorney and counsel for Davis and Gessner, and to the attorneys of the trustees, to be paid out of the fund, do report as follows:

I was the referee to whom the issues in the action was referred. There have been more than two hundred sessions, at which testimony was taken.

In my opinion the case is a difficult and extraordinary one within the meaning of § 309 of the code, and that a proper allowance to the plaintiffs' and to Davis and Gessner's attorneys would be $3,000 each, and to the attorneys of the trustees, defendants, $1,500.

Dated New York, June 23d, 1873.

AMASA A. REDFIELD.

325 *Final judgment, June 23d, 1873.*

Supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and PIERSON S. MATTOX, plaintiffs,
ag'st
TIMOTHY P. RICHARDS, JAMES W. DAVIS, James H. Gessner, William Ruth, Henry C. Crane, trustee for Wilhelmina Davis Train, John Doe, Richard Roe, and Susan Doe, John Brown, William Brown, and Sarah Brown, Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, Elizabeth Davis, wife of James W. Davis, and others, defendants.

This cause having been referred to Amasa A. Redfield, esq., to hear and

determine the same, and the said referee having made several reports herein, dated, respectively, November 9th, 1871, November 16th, 1871, and March 14th, 1872, and the same having been duly filed, and the said referee having made his final report herein, dated June 7th, 1873, and the same having been also duly filed:

Now, on motion of Clark Bell, attorney for the plaintiffs, after hearing D. W. Gillett, of counsel for Davis and Gessner, and L. L. Kellogg, esq., of counsel for the trustees, and Wm. E. Stiger, esq., of counsel for Henry J. Rogers,

326 It is ordered, adjudged, and decreed that the said reports be, and that the same are, in all respects hereby, ratified and confirmed; and it is further adjudged, ordered, and decreed that on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant, James W. Davis, at the city of New York, made a contract in writing with the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, &c., parties of the second part, for the delivery by the said James W. Davis and his associates unto the said parties of the second part of a large quantity of railroad ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices and upon certain terms and conditions, a copy of which contract is annexed to the complaint in this action.

That subsequently, and at various times between the 20th day of November, 1867, and the 20th day of November, 1868, the said Davis, for a valuable consideration to him paid, assigned proportionate interests in the profits and business of the said contract to and associated with himself in the performance of said contract, certain parties, to wit, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train.

That said assignments are fully set forth in the report of the referee herein, bearing date November 9th, 1871.

That the said parties owning said several interests prosecuted the work of making and delivering the ties, timber, and lumber so as aforesaid contracted to be delivered, and did, between the 20th day of November, 1867, and the 1st day of January, 1869, deliver to the said defendants, Durant and others, trustees as aforesaid, one million ties and feet of lumber and timber, for which the said trustees became indebted to the said parties so associated in the performance of the contract first above mentioned, on account of which indebtedness the said trustees have paid to the said associates large sums of money from time to time, as the work under said contracts progressed.

327 That a profit was realized by said associates for the work done and materials furnished under said million-tie contract, and in the business connected therewith, of the sum of two hundred and twenty-five thousand dollars ($225,000).

That the said sums of money so received from said trustees on account of such indebtedness came into the possession of the defendants James W. Davis and James H. Gessner, two of said associates, and were by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber,

and lumber, exclusive of and unconnected with the work and material specified in the contract set out in Schedules A, B, and C annexed to the complaint herein, and known as the million-tie contract.

That for such work done and materials furnished the said trustees became and are indebted unto the said James W. Davis and James H. Gessner.

That the sums of money received from the trustees on account of the first above-mentioned contract, and belonging to the first above-mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of the plaintiffs, or any of said associates, besides said Davis and Gessner, and that none of said associates, except said Davis and Gessner, were associated in the said business done and transacted by Davis and Gessner outside of said first-named contract, or were in any wise interested therein as partners or participants in the profits or benefits thereof.

That all of the said work so done by the said Davis and Gessner outside of and not relating to the contract set forth in the complaint in Schedules A, B, and C, and known as the million-tie contract, was done along the line of the Union Pacific Railroad at points westward of the point known as Elk Mountain, and that the business so done at the points west of Elk Mountain was done by the said James W. Davis and James H. Gessner, in the name and under the style sometimes of "James
328 W. Davis and Associates," and sometimes in the name and under the style of "James W. Davis, Trustee."

That the work done and performed and materials furnished in the execution of the contract set out in the complaint in Schedules A, B, and C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific Railroad at points eastward of a point known as Elk Mountain, and that their relation was as is set out in the certificates set forth in said report.

That no partnership existed at any time, and no articles or agreement of partnership were ever made between the parties in interest in the said contract, known as the million-tie contract. That the transaction was a special venture in which the various parties held respectively the several interests or shares mentioned and specified in the report of the referee herein, dated November 9th, 1871, and that no articles of partnership were ever made between the said James W. Davis and James H. Gessner in relation to the work done west of Elk Mountain.

That the parties so as aforesaid associated in interest in the million-tie contract became and were the owners of a large quantity of ties, lumber, and timber, and other materials in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

It is further adjudged that the defendants, Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, are indebted, under the contract of settlement referred to in the report of the referee herein, bearing date March 14, 1872, to James W.

Davis and his said associates in the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872; the said sum being the amount due from said
329 trustees to said James W. Davis and said associates, or to any of them individually arising of said million-tie contract, or the second contract for work done and materials furnished west of Elk Mountain. And that such payment by the said trustees shall be a release to them of all liability on their part by reason of the service upon them of the trustee process.

It is further adjudged that said James W. Davis and his said associates do recover of the said trustees the said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14, 1872, and that the same be paid into the hands of the receiver heretofore appointed in this action, to be disbursed by him as hereinafter directed.

It is further adjudged that there is due to the associates of said Davis and Gessner in the million-tie contract, and that they do recover from James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000.00), being the amount of profits realized by said associates for the work done and materials furnished under said million-tie contract, and in the business connected therewith, and used and expended by said James W. Davis and James H. Gessner without the knowledge, privity, assent, or concurrence of any the associates in said million-tie contract, except Davis and Gessner, in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and materials done and furnished under the million-tie contract.

It is further adjudged that all persons, parties, and corporations named in clauses one and two of the report of the referee herein, dated November 16th, 1871, having appeared, filed their claims, and proved the same before the referee, and the same having been adjusted and reported by the said referee, shall be considered as adjudicated upon as to the amounts claimed by them respectively.

330 That those claims so embraced in clause one of said report of November 16th, 1871, are not chargeable to the parties associated in the million-tie contract, or to any fund that may come into the hands of the receiver herein belonging to said contract.

It is further adjudged that said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), and interest from March 14th, 1872, found due from said trustees to James W. Davis and Associates, and to be paid into the hands of the receiver herein, shall be disbursed by the said receiver as follows, viz:

1st. He shall pay the fees of the referee herein.

2d. The costs of the parties, as taxed by the clerk herein, viz, to Clark Bell, esq., the attorney for the plaintiffs, the sum of two thousand four hundred and three $\frac{78}{100}$ dollars, for his costs and disbursements, together with the sum of three thousand dollars as additional allowance under § 309 of the code; to the attorney and counsel for the defendants Davis and Gessner, the sum of five hundred and eighty $\frac{20}{100}$ dollars for their costs and disbursements, together with the sum of three thousand dollars, as an additional allowance, as aforesaid, and to the attorneys for the said trust-

ees, defendants, the sum of two thousand and sixty-four $\frac{5}{100}$ dollars being their costs and disbursements, together with the sum of fifteen hundred dollars, as additional allowance to them as aforesaid under said section of the code, all of which are to be so paid out of said fund.

3d. The balance of said fund to be distributed pro rata among the persons, parties, and corporations named as creditors in clause one of the report of the referee herein, dated November 16th, 1871, and the associates of James W. Davis under the million-tie contract.

The basis of calculation being the amounts found due said persons, parties, and corporations, respectively, in clause one of said report of November 16th, 1871, and the amount found due said associates in the million-tie contract, as hereinbefore set forth, viz, $225,000.

It is further adjudged that the receiver herein shall retain possession of the amount or share due to the associates in the million-tie
331 contract, as last above provided, and distribute the same pro rata among the persons, parties, and corporations mentioned in clause two of the report of the referee herein, dated November 16th, 1871.

Enter.

(Signed) D. P. I.

332 N. Y. supreme court.

WILLIAM F. DURANT AND OTHERS
ag'st
JAMES W. DAVIS AND OTHERS.

In accordance with the foregoing, it is adjudged and decreed that James W. Davis, James H. Gessner, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, and Henry C. Crane, trustee for Wilhelmina Davis Train, associates, recover of Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ ($64,238.21), with interest from March 14th, 1872, said sum to be paid to the receiver herein, as above provided.

In accordance with the foregoing it is adjudged and decreed that Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, and Henry C. Crane, trustee for Wilhelmina Davis Train, associates of James W. Davis and James H. Gessner in the million-tie contract, recover of said James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000), said sum to be paid to the receiver herein as above provided.

(Endorsed:) Filed June 23d, 1873.

(Indorsed:) N. Y. supreme court. William F. Durant et al. against James W. Davis et al. Copy final decree and judgment. Clark Bell, plaintiffs' attorney, 20 Nassau st., N. Y.

333 *Final judgment, June 23d, 1873.*

Supreme court, city and county of New York.

WILLIAM F. DURANT, MORDECAI B. SPRAGUE, and Pierson S. Mattox, plaintiffs,
ag'st
TIMOTHY P. RICHARDS, JAMES W. DAVIS, JAMES H. Gessner, William Ruth, Henry C. Crane, trustee for Wilhelmina Davis Train, John Doe, Richard Roe, and Susan Doe, John Brown, William Brown, and Sarah Brown, Thomas C. Durant, Oliver Ames, John Duff, Sidney Dillon, Henry S. McComb, Cornelius S. Bushnell, Benjamin E. Bates, Elizabeth Davis, wife of James W. Davis, and others, defendants.

This cause having been referred to Amasa A. Redfield, esq., to hear and determine the same, and the said referee having made several reports herein, dated, respectively, November 9th, 1871, November 16th, 1871, and March 14th, 1872, and the same having been duly filed, and the said referee having made his final report herein, dated June 7th, 1873, and the same having been also duly filed:

Now, on motion of Clark Bell, attorney for the plaintiffs, after hearing D. W. Gillett, of counsel for Davis and Gessner, and L. L. Kellogg, esq., of counsel for the trustees, and Wm. E. Stiger, esq., of counsel for Henry J. Rogers,

334 It is ordered, adjudged, and decreed that the said reports be, and that the same are in all respects hereby, ratified and confirmed; and it is further adjudged, ordered, and decreed, that on or about the 19th and 20th days of November, 1867, and the 3d day of December, 1867, the defendant James W. Davis, at the city of New York, made a contract in writing with the defendants, Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees, &c., parties of the second part, for the delivery by the said James W. Davis and his associates unto the said parties of the second part of a large quantity of railroad ties, lumber, and timber along the line of the Union Pacific Railroad, then in process of construction, at certain prices and upon certain terms and conditions, a copy of which contract is annexed to the complaint in this action.

That subsequently, and at various times between the 20th day of November, 1867, and the 20th day of November, 1868, the said Davis, for a valuable consideration to him paid, assigned proportionate interests in the profits and business of the said contract to, and associated himself in the performance of said contract, certain parties, to wit, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, James H. Gessner, and H. C. Crane, trustee for W. D. Train.

That said assignments are fully set forth in the report of the referee herein, bearing date November 9th, 1871.

That the said parties owning said several interests prosecuted the work of making and delivering the ties, timber, and lumber so as aforesaid con-

tracted to be delivered, and did, between the 20th day of November, 1867, and the 1st day of January, 1869, deliver to the said defendants Durant and others, trustees as aforesaid, one million ties and feet of lumber and timber, for which the said trustees became indebted to the said parties so associated in the performance of the contract first above mentioned, on account of which indebtedness the said trustees have paid to the said associates large sums of money from time to time, as the work under said contracts progressed.

335 That a profit was realized by said associates for the work done and materials furnished under said million-tie contract, and the business connected therewith, of the sum of two hundred and twenty-five thousand dollars ($225,000).

That the said sums of money so received from said trustees on account of such indebtedness came into the possession of the defendants James W. Davis and James H. Gessner, two of said associates, and were by them expended and disbursed in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and material specified in the contract set out in Schedules A, B, and C, annexed to the complaint herein, and known as the million-tie contract.

That for such work done and materials furnished, the said trustees became and are indebted unto the said James W. Davis and James H. Gessner.

That the sums of money received from the trustees on account of the first above-mentioned contract, and belonging to the first above-mentioned associates or parties interested in the said contract, called the million-tie contract, was so used and expended by the said James W. Davis and James H. Gessner, without the knowledge, privity, assent, or concurrence of the plaintiffs, or any of said associates, besides said Davis and Gessner, and that none of said associates, except said Davis and Gessner, were associated in the said business done and transacted by Davis and Gessner outside of said first-named contract, or were in any wise interested therein as partners or participants in the profits or benefits thereof.

That all of the said work so done by the said Davis and Gessner outside of and not relating to the contract set forth in the complaint in Schedules A, B, and C, and known as the million-tie contract, was done along the line of the Union Pacific Railroad at points westward of the point known as Elk Mountain, and that the business so done at the points west of Elk Mountain was done by the said James W. Davis and James H. Gessner, in the name and under the style sometimes of "James W.

336 Davis and Associates," and sometimes in the name and under the style of "James W. Davis, Trustee."

That the work done and performed and materials furnished in the execution of the contract set out in the complaint in Schedules A, B, and C, and known and distinguished as the million-tie contract, was all done, performed, and furnished along the line of the Union Pacific Railroad, at points eastward of a point known as Elk Mountain, and that their relation was as is set out in the certificates set forth in said report.

That no partnership existed at any time, and no articles or agreement of partnership were ever made between the parties in interest in the said contract, known as the million-tie contract. That the transaction was a

special venture in which the various parties held respectively the several interests or shares mentioned and specified in the report of the referee herein, dated November 9th, 1871, and that no articles of partnership were ever made between the said James W. Davis and James H. Gessner in relation to the work done west of Elk Mountain.

That the parties so as aforesaid associated in interest in the million-tie contract became and were the owners of a large quantity of ties, lumber, and timber, and other materials in the progress of their work, in excess of and beyond the quantity stipulated to be delivered by the terms of the said contract, which material they have, since the completion of the said contract, sold and delivered to the trustees aforesaid, for which the said trustees became and are indebted to the said parties.

It is further adjudged that the defendants Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, are indebted, under the contract of settlement referred to in the report of the referee herein, bearing date March 14, 1872, to James W. Davis and his said associates, in the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872; the said sum being the amount due from said
337 trustees to said James W. Davis and said associates, or to any of them individually, arising out of said million-tie contract or the second contract for work done and materials furnished west of Elk Mountain. And that such payment by the said trustees shall be a release to them of all liability on their part by reason of the service upon them of the trustee process.

It is further adjudged that said James W. Davis and his said associates do recover of the said trustees the said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14, 1872, and that the same be paid into the hands of the receiver heretofore appointed in this action, to be disbursed by him as hereinafter directed.

It is further adjudged that there is due to the associates of said Davis and Gessner in the million-tie contract, and that they do recover from James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000), being the amount of profits realized by said associates for the work done and materials furnished under said million-tie contract and in the business connected therewith, and used and expended by said James W. Davis and James H. Gessner without the knowledge, privity, assent, or concurrence of any of the associates in said million-tie contract, except Davis and Gessner, in and about the business of making and delivering to said trustees certain other large quantities of railroad ties, timber, and lumber, exclusive of and unconnected with the work and materials done and furnished under the million-tie contract.

It is further adjudged that all persons, parties, and corporations named in clauses one and two of the report of the referee herein, dated November 16th, 1871, having appeared, filed their claims, and proved the same before the referee, and the same having been adjusted and reported by the said referee, shall be considered as adjudicated upon as to the amounts claimed by them respectively.

338 That those claims so embraced in clause one of said report of

November 16th, 1871, are not chargeable to the parties associated in the million-tie contract, or to any fund that may come into the hands of the receiver herein, belonging to said contract.

It is further adjudged that said sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), and interest from March 14th, 1872, found due from said trustees to James W. Davis and associates, and to be paid into the hands of the receiver herein, shall be disbursed by the said receiver as follows, viz:

1st. He shall pay the fees of the referee herein.

2d. The costs of the parties as taxed by the clerk herein, viz, to Clark Bell, esq., the attorney for the plaintiffs, the sum of two thousand four hundred and three $\frac{78}{100}$ dollars for his costs and disbursements, together with the sum of three thousand dollars as additional allowance under § 309 of the code; to the attorney and counsel for the defendants Davis and Gessner the sum of five hundred and eighty $\frac{20}{100}$ dollars for their costs and disbursements, together with the sum of three thousand dollars as an additional allowance as aforesaid, and to the attorneys for the said trustees defendants the sum of two thousand and sixty-four $\frac{5}{100}$ dollars, being their costs and disbursements, together with the sum of fifteen hundred dollars as additional allowance to them, as aforesaid, under said section of the code, all of which are to be so paid out of said fund.

3d. The balance of said fund to be distributed pro rata among the persons, parties, and corporations named as creditors in clause one of the report of the referee herein, dated November 16th, 1871, and the associates of James W. Davis under the million-tie contract.

The basis of calculation being the amounts found due said persons, parties, and corporations, respectively, in clause one of said report of November 16th, 1871, and the amount found due said associates in the million-tie contract, as hereinbefore set forth, viz, $225,000.

It is further adjudged that the receiver herein shall retain pos-
339 session of the amount or share due to the associates in the million-tie contract, as last above provided, and distribute the same pro rata among the persons, parties, and corporations mentioned in clause two of the report of the referee herein, dated November 16th, 1871.

Enter.

(Signed) D. P. I.

340 N. Y. supreme court.

WILLIAM F. DURANT AND OTHERS
ag'st
JAMES W. DAVIS AND OTHERS.

In accordance with the foregoing, it is adjudged and decreed that James W. Davis, James H. Gessner, Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, and Henry C. Crane, trustee for Wilhelmina Davis Train, associates, recover of Thomas C. Durant, Oliver Ames, Sidney Dillon, John Duff, H. S. McComb, Cornelius S. Bushnell, and Benjamin E. Bates, trustees for the contractors for building the Union Pacific Railroad, the sum of sixty-four thousand two hundred and thirty-eight $\frac{21}{100}$ dollars ($64,238.21), with interest from March 14th, 1872, said sum to be paid to the receiver herein, as above provided.

In accordance with the foregoing, it is adjudged and decreed that Mordecai B. Sprague, William F. Durant, Pierson S. Mattox, Timothy P. Richards, William Ruth, and Henry C. Crane, trustee for Wilhelmina Davis Train, associates of James W. Davis and James H. Gessner in the million-tie contract, recover of said James W. Davis and James H. Gessner the sum of two hundred and twenty-five thousand dollars ($225,000), said sum to be paid to the receiver herein, as above provided.

(Endorsed:) Filed June 23d, 1873.

341 (Indorsed:) N. Y. supreme court. William F. Durant et al. against James W. Davis et al. Copy final decree and judgment. Clark Bell, plaintiffs' attorney, 20 Nassau st., N. Y.

Please take notice that the foregoing and within is a copy of the final judgment and decree entered in the above action on the 23d day of June, 1873.

To CLARK BELL,
Pl'ffs' Att'y.

342 *Note by clerk Sup. C't U. S.*

Here follows Exhibits K and L to deposition of J. E. Wild. (See order of C. C. U. S., page 387.) 1 draft-book and 1 check-book, with stubs. Omitted in printing the record. On file with papers in the case in clerk's office Sup. C't U. S.

343 *Exhibit K to deposition of B. F. Bunker.—M. A. Potter, Com'r.*

Supreme court.

WILLIAM F. DURANT ET AL.
vs.
JAMES W. DAVIS ET AL.

Evidence of Joseph W. Hughes, taken in behalf of pl'ffs before A. A. Redfield, esq., referee, March 13, 1871.

Mr. Bell for pl'ffs; Mr. Woolworth for d'f'ts.

JOSEPH W. HUGHES herein says:

I was the book-keeper and clerk of A. M. Burnham, & have been since May, 1868. As such I have had charge of his papers, books, accounts, and business generally relating to work done by him on the line of the U. P. R. R. Co. in Wyoming Territory. Have paid his men & been familiar with all the details of his business. I have carefully read the evidence given by Dr. A. M. Burnham in this case, & sworn before the referee on this day of March, 1871, and I fully concur in his evidence as to the nature & character of his business with each of the said firms of Jas. W. Davis & Associates & with Davis, Sprague & Co., & with the business and respective operations of both & each of said firms. The amount of business done by A. M. Burnham for the parties in interest in
344 the million-tie contract, being the contract set out in complaint as

schedules A, B, & C, was very large, & covered a large tract of territory. This was all done by us with the parties in interest under the firm name of Davis, Sprague & Co. They acted under that name, & we did business with them under that name; their operations were all at and eastward of Elk Mountain. I had constant transactions with the firm of Davis, Sprague & Co., access to their accounts & books, & was very intimately connected with their operations & business. The million tie contract was performed and fulfilled east of & at Elk Mountain. We kept our accounts & all bills, receipts, & transactions were, so far as they related to the million-tie contract or work or materials under it, with Davis, Sprague & Co. We had contracts with James W. Davis & Ass't's, and kept accounts & transacted business with that firm, but all our business and transactions with James W. Davis & Ass'ts were done west of Elk Mountain & outside of & beyond the million-tie contract, & had no relation to it.

We kept our accounts with the two firms entirely distinct & separate, & they also did with us. The work of the two firms was going on at same time. That of Davis, Sprague & Co. east of Elk Mountain, & that of James W. Davis & Ass't's west of Elk Mountain; the former relating to the performance of the work beyond & outside of the million-tie contract.

James W. Davis & James H. Gesner were known as the parties
345 in interest in the work done west of Elk Mountain, & Davis, Sprague & Co. had no interest in or connection with any work west of Elk Mountain, or in anything but the million-tie contract, that I know of.

I heard Mr. Sprague notify Mr. Burnham in December, 1868, that he was not interested as a partner in the Jas. W. Davis & Ass't's, and had no interest in the work west of Elk Mountain. I have heard him so state at various times since that date. All the work done by Mr. Burnham & materials delivered under the contracts with Davis, Sprague & Co. were delivered to James Evans, sup't of construction, so far as I know. Mr. S. B. Reed acted as sup't of construction at Green River & west, and the material delivered by Burnham on his contracts with James W. Davis & Associates west of Green River were delivered to S. B. Reed, sup't, and payments made on his estimates.

J. H. HUGHES.

Subscribed & sworn to before me this 13th day of March, 1871.

AMASA A. REDFIELD,
Referee.

(Endorsed:) Opened for Mr. Whitney, and filed April 28, 1877. Wm. H. Bradley, cl'k.

346 United States circuit court, northern district of Illinois.

SATURDAY, *October* 9, A. D. 1875.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v. } In chancery.
JAMES W. DAVIS ET AL.

Now come the parties, by their solicitors, and defendant, by his solici-

tor, moves the court for leave to withdraw his demurrer and to dismiss the bill herein. And, on motion of complainant's solicitor, leave is given complainant to amend his bill of complaint; and thereupon said motion of defendant is overruled by the court.

347 United States circuit court, northern district of Illinois.

THURSDAY, *November* 11, A. D. 1875.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

Now come the parties, by their solicitors, and, on motion of complainant's solicitors, the defendants are ruled to answer herein by the next rule day of this court, a copy of the bill herein to be furnished to defendants' solicitor by Monday morning next.

348 United States circuit court, northern district of Illinois.

THURSDAY, *December* 9, A. D. 1875.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

Now come the parties, by their solicitors, and now comes on to be heard the motion of the defendants to strike from the files the bill of complaint herein, and the court, after hearing the same, overrules said motion.

And thereupon the defendants file demurrer to the bill herein, which is submitted to the court, and the court not being now sufficiently advised upon the same, takes time to consider.

349 United States circuit court, northern district of Illinois.

TUESDAY, *December* 21, A. D. 1875.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

The court having considered, and being now sufficiently advised upon the demurrer of the defendant to the complainant's amended bill of complaint herein, overrules the said demurrer.

350 United States circuit court, northern district of Illinois.

THURSDAY, *January* 13, A. D. 1876.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

Now comes complainant, by his solicitor, and, on his motion, it is ordered by the court that the defendant William F. Durant answer the bill herein within fifteen days after service of a copy of this order upon him.

351 United States circuit court, northern district of Illinois.

FRIDAY, *February* 18*th*, A. D. 1876.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

Now come the parties, by their solicitors, and now comes on to be heard the exceptions of complainant to the answer of William F. Durant, defendant herein, and after hearing the same, the court not being now sufficiently advised in the premises, takes time to consider.

352 United States circuit court, northern district of Illinois.

THURSDAY, *February* 24, A. D. 1876.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

On motion, leave is given complainant to file an amended bill of complaint herein, and the defendants are ruled to appear, plead, answer, or demur thereto within twenty days.

353 United States circuit court, northern district of Illinois.

THURSDAY, *November* 9, A. D. 1876.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v.
JAMES W. DAVIS, WILLIAM F. DURANT ET AL. } In chancery.

Now comes the complainant, in the above entitled cause, by Henry C. Whitney, his solicitor, and the defendant William F. Durant, by Lawrence,

Campbell and Lawrence, his solicitors, and upon motion by complainant's solicitor, the solicitors for said Durant being now present in court and consenting to the same, it is hereby ordered that James F. Meagher be, and he is hereby, appointed special commissioner in the above entitled cause for the purpose of taking the testimony therein, with full powers usual and necessary to such officers.

And he is hereby directed to return to the court any documentary testimony that may be offered by either of said parties, as well as any depositions that may be taken before him on behalf of either of them.

354 United States circuit court, northern district of Illinois.

MONDAY, *May* 7, A. D. 1877.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs. } In chancery.
JAMES W. DAVIS ET AL.

Now come the parties, by their solicitors, and, on motion of complainant's solicitors, time for complainant to close proofs herein is extended thirty days.

355 United States circuit court, northern district of Illinois.

THURSDAY, *May* 10, A. D. 1877.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs. } In chancery.
JAMES W. DAVIS ET AL.

On motion of Mr. Whitney, solicitor, it is ordered that commission issue to A. R. Dawson, clerk of the United States court for Dakota Territory, and to J. W. Bruner, clerk of the United States court for Wyoming Territory, to take depositions herein.

356 United States circuit court, northern district of Illinois.

FRIDAY, *July* 13, A. D. 1877.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
v. } In chancery.
JAMES W. DAVIS ET AL.

On motion of complainant's solicitor, leave is given complainant to take the testimony of Henry J. Rogers, Charles D. Sherman, and Lucius Hoyt.

357 United States circuit court, northern district of Illinois.

MONDAY, *September* 10, A. D. 1877.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT ET AL. } In chancery.

On motion, it is ordered by the court that Gerrett S. Thom, esq., be, and he is thereby, appointed a special examiner to take the deposition of Henry J. Rogers, and to report the same to the court herein.

358 United States district court, northern district of Illinois.

FRIDAY, *October* 5, 1877.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J ROGERS
v.
JAMES W. DAVIS ET AL. } In chancery.

Now come the parties, by their solicitors, and on motion of Mr. Whitney, solicitor, it is ordered by the court that said cause be set down for hearing upon the pleadings and proof herein.

359 United States circuit court, northern district of Illinois.

THURSDAY, *January* 24, A. D. 1878.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs.
JAMES W. DAVIS ET AL. } In chancery.

Now come the parties, by their solicitors, and thereupon this cause is submitted to the court on the pleadings and proofs, and upon briefs, and the cause is taken under advisement by the court.

360 United States circuit court, northern district of Illinois.

MONDAY, *July* 15, A. D. 1878.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs.
JAMES W. DAVIS, JAMES H. GESNER, TIMOTHY P. RICHARDS, WILLIAM RUTH, WILLIAM F. DURANT, MORDECAI B. SPRAGUE, PIERSON S. MATTOX, and HENRY C. CRANE, trustee, &c. } In chancery.

Now come the parties, by their solicitors, and the court having considered,

and being now fully advised upon the matters submitted upon the pleadings and proofs herein, finds the equities herein with the defendants, and dismisses the bill herein at the costs of complainant.

It is thereupon considered, adjudged, and decreed by the court, that this cause be dismissed, and that the defendants do have and recover of and from the complainant their costs and charges by them about their defence in this behalf expended, amounting to the sum of four hundred and seven dollars and ninety-five cents, and that execution issue therefor.

361 United States circuit court, northern district of Illinois.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT. } Chancery.

Decision of Judge Blodgett—Rendered July 15, 1878.

This is a bill in equity by the complainant to recover from the defendants, as copartners, doing business under the firm name of J. W. Davis and Associates, the amount due on certain drafts and checks held by the complainant, on which he claims the defendant is liable either as drawers or acceptors. The complainant alleges that he is the owner of the several pieces of negotiable paper described in said bill, but charges that the same are lost, or that he cannot produce the same in evidence, or make profert to this court thereof; and hence seeks relief in equity instead of bringing a suit at law. The defendant Durant only has been served with process, and he has answered, denying under oath that he was a partner in
362 the firm of J. W. Davis & Associates, and denying that he is in any manner liable to the complainant upon the paper set out in the complaint.

Two points are made by the defendant. First. That a court of equity has no jurisdiction as the proof does not show that the paper sued on is actually lost. It is admitted that the checks and drafts in question were left by the complainant in the hands of a receiver appointed by the supreme court of New York City, in a suit brought by Durant and others against Rogers and others for the purpose of settling the affairs of the said alleged firm of J. W. Davis & Associates, said paper being so left with the receiver for the purpose of being proved up in order that it might share in the distribution of a fund which was paid into said court as the property of the firm of J. W. Davis & Associates.

The defendant insists that there is no evidence that the papers are not now in the hands of some officers of the said supreme court, and among the papers in that suit. The proof in this case only shows that the complainant has applied to the receiver and to the receiver's clerks in the New York case for a delivery to him of this paper. It would occur to
363 me that the proper method of obtaining possession of this paper was for the complainant to have applied to the court where this suit was pending to direct the officers to surrender this paper to them, which the law must presume is in the possession, or among the files of some of the officers of this complicated New York case.

The evidence tends to show that the New York case was an extremely complicated case; that Durant filed his bill in the supreme court of New

York City, for the purpose of settling the affairs of the alleged firm of Davis, Sprague & Company; that in the course of the litigation of that case, it came out that two firms had existed, one under the name of Davis, Sprague & Co., and the other under the firm name of J. W. Davis and Associates, and there were creditors and assets apparently belonging to both of those alleged firms.

The court in that case held that the defendant now before this court was not a member of the firm of J. W. Davis and Associates, but that he was a member of the partnership or venture doing business under the name of Davis, Sprague & Co., and it so came about in the progress of that litigation, that a fund was created in court alleged to belong to the creditors of J. W. Davis & Associates. And this complainant, claiming to be a creditor of the firm of J. W. Davis & Associates, filed his claim—claims now in question—before that court for the purpose of sharing in a dividend out of that fund.

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Now the court must presume that proof of a debt for the purpose of sharing in the fund in court must have been somewhere preserved among the files of that court. The ordinary papers themselves are in existence, and it would occur to me very forcibly, that the complainant in this case ought to have applied to that court, before he could have been said to have exhausted every method of compelling the receiver and officers of the court to turn over the papers to him.

The object for which they were given into the possession of the court having been accomplished, that court would probably, on request, caused them to be returned on some terms to complainant.

The proofs show that he has made no such effort, and it may be well doubted whether the complainant has in this case shown that the papers are lost, within the meaning of the law.

It seems to me that complainant has not made the effort which ought to have been made to obtain possession of those notes and evidences of indebtedness. He has not made those efforts which the law will indicate was the proper step for him to recover, because I doubt whether the receiver or receiver's clerk or officers of the court would have been authorized to deliver these papers back to the complainant, in order that he might use them in evidence here, or any other papers without leave of the court.

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There may be still another question upon which the jurisdiction of the court in this case could be properly attacked, and that is, it is undoubtedly well settled, what he asserts has been the law of the English high court of chancery, and of courts of equity in this country, since Lord Hardwiche's time, that equity had jurisdiction in case of a lost bond or a negotiable paper, and the reason or given was that the holder of the paper had the right to a discovery from the debtor or defendant, as to whether any such paper was extant, whether he had in the first place issued it, or given the paper, and, secondly, whether it still remained unpaid, and at the time this principle of jurisdiction was asserted there was no other method by which a party could obtain relief, when he had no witness by whom he could prove the contents of the paper, but the debtor himself, in regard to lost paper. In such cases he could search the conscience of the debtor himself, for the purpose of ascertaining whether the debt still remained unpaid, by resort to a court

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of equity, but in later years, since the adoption of the practice by Congress, allowing parties to secure that ground of jurisdiction has been completely superseded, and there is no longer any occasion to go into a court of equity for the purpose of searching the conscience of a debtor. You can ascertain the fact by the aid of a court of law, as readily as a court of chancery, and therefore it may be said that the reason on which jurisdiction was formerly asserted, has ceased.

Another ground upon which the courts sustained their jurisdiction in cases of lost instruments was, that before they would require a defendant to pay a debt or judgment rendered upon a suit brought on a lost note or bond, they would require the creditor to indemnify the debtor
367 against the instrument appearing in the hands of any future bona fide holder for value, so that the court assumes to protect the debtor in the payment of its judgment or decree. But in late years courts all have come to observe the same discretion, and I think it is now the settled practice that in this State for courts of law to render judgments upon lost instruments; but before they would allow execution to issue, they would require the complainant to file a bond indemnifying the defendant against the paper in case it should appear in the hands of any bona fide holder afterwards, or that he should be subjected to loss or expense. Courts of law thus assuming to exercise the same discretionary power to protect the defendant that had been formerly adopted by courts of equity, so that what with the progress which courts all have made in protecting the rights of defendants in suits on lost instruments and the change in the law authorizing complainant to call the defendant as a witness in the trial of a suit at law, there would seem to me but little left of the reason which induced courts of equity ordinarily to take jurisdiction of this class of cases.

368 I, however, have come to the conclusion that this is a question which may perhaps more properly be made in an appellate court if the case should go any farther, and that it would be perhaps not necessary that this court should assume to overrule the old established principles of the equity courts on this question, inasmuch as in looking into the merits of the case, I am inclined to dispose of it rather upon its merits than upon any technical question.

The second point made by the defendant is as to the merits of the complainants' case; that the defendant Durant was never a member of the firm or association of individuals doing business as J. W. Davis and Associates.

It appears from the proofs in this case, and they are very voluminous, that on the 19th of November, 1867, James W. Davis submitted to the trustees of the Union Pacific Railroad Company a proposition to furnish one million railroad ties, to be delivered on the line of the Union Pacific Railroad at points between Cheyenne and the North Platte at certain specified prices. This proposition was accepted by the trustees and re-
369 sulted in a written contract, dated December 3, 1867, between J. W. Davis for himself and others of the first part and H. C. Crane, secretary of the trustees, of the second part, for the delivery of said million ties and the purchase of a saw-mill and outfits owned by the railroad company or the trustees, and for the delivery by Davis of the lumber to be cut by said mill within a year from that date, and for certain hewn timber to be delivered at certain stations. This contract is known in the pleadings and

proofs in this case as the "million tie contract." The contract is signed "J. W. Davis for self and associates." At the time it was made, it was not known who would be Mr. Davis' associates, but the trustees of the railroad company insisted that Davis should associate with himself persons of capital sufficient to insure the completion of the contract within the time limited and according to its terms. Soon after the contract was made, Davis assigned to the defendant William F. Durant three-tenths of this contract, and the assignment shows that it is for an interest in a contract between the trustees of the company and James W. Davis and As-
370 sociates. Assignments were also made to obtain persons of different interests, one-tenth, one-twentieth, &c., &c., from time to time, which are not now in question, and cut no figure, that I see, in the decision of this case.

Under this contract, Davis and those interested with him got out the million ties and a large quantity of timber and lumber, and the business in the matter of getting out this million ties and this running of the saw-mill, and the delivery of the hewn timber was conducted under the name of Davis, Sprague & Co.

It is true that on the books of the railroad company it would seem that they kept the accounts, so far as making papers for the delivery of ties, in the name of J. W. Davis & Associates, and that is entirely accounted for from the fact that the contract was with J. W. Davis & Associates. But in the dealings of these parties with their employees, with persons from whom they procured supplies, the shipments of their supplies on to the place where they were to be consumed or used, in all their bills and drafts, the firm name used in the execution of the million-tie contract was Davis, Sprague & Co. I think there is one exception shown in the proof,
371 perhaps by way of evidence to this, and that is that the banking account of the contractors with the firm of Koontze Brothers, who were bankers at Cheyenne and Omaha, was kept on the books of Koontze Brothers in the name of J. W. Davis & Associates, but the checks were all drawn against that account in the name of Bunker, cashier of Davis, Sprague & Co., and no firm name was really attached to the checks. But in their dealings all their bills, their drafts, their bills of exchange, their receipts, their vouchers, which were taken from time to time from their employees, all their blanks, their account-books, their day-book, their ledger, their cash book, were all marked and kept in the firm name of Davis, Sprague & Co. I think that abundantly proved.

About the time that Davis & Sprague had reached the conclusion, or near the conclusion, of the contract for the delivery of the million ties, they entered into negotiations with the trustees of the railroad company for the delivery of a further lot of ties at points west of where this contract was to be completed.

In the interviews with the officers of the railroad, Davis stated
372 that he did not wish the same parties to be associated with him in the million-tie contract; that he wished the contract mainly for himself—wished the contract on his own account.

The evidence shows that he obtained no written contract for the second lot of ties, but that he did obtain, or had an understanding with the officers of the Union Pacific Railroad Company that they would take from him such ties as he might deliver within a certain limited time at points west of Elk Mountain, and Davis accordingly continued to deliver ties after

the million-tie contract, and the business in connection with the delivery of those ties was all transacted apparently in the name of J. M. Davis and Associates.

In that name they gave their vouchers and receipts, kept their true accounts with their men, drew drafts, checks, and generally transacted their business, and the paper in controversy was all drawn by the firm of J. W. Davis & Associates after the fulfilment of the million-tie contract.

About the only question in the case is, whether the defendant
373 Durant was a member of the firm of J. W. Davis & Associates, who continued to deliver ties after the fulfilment of the "million-tie contract." This is purely a question of fact. Mr. Durant has denied under oath complainant's allegations in that regard, denied that he was a member of J. W. Davis & Associates, and the burden of proof is clearly on complainant to show affirmatively that Mr. Durant was a member of this firm, which continued to deliver ties after the completion of the million-tie contract.

It is a thing admitted that Mr. Durant was a member of the association or firm or partnership, call it what you choose, that performed the million-tie contract, but it is denied that he was a member of the succeeding firm, or ever continued to deliver ties with Davis as the principal man and manager.

The evidence shows that Davis associated with him a man by the name of Gesher. He also promised to associate Mr. T. C. Durant, who was the vice-president of the Union Pacific road and supervised this class of supply contracts; that he would associate with him responsible per-
374 sons, but no person appears upon the proof here to have been actually associated in the delivery of ties, except Gesner, after the completion of the million-tie contract.

The evidence shows that Mr. Durant, the present defendant, was at Fort Saunders, which was the principal center of operations for this million-tie contract firm during the fore part of the year 1868, and during the time that the million-tie contract was in process of being executed. That Mr. Durant stopped there two weeks, and while there gave his attention, to some extent, to the delivery of some lumber which came down the Laramie River, I think, at that point, and had been sawn in the mountains somewhere by this saw-mill, which is described in the contract, and was floated down the stream and delivered there for railroad purposes.

Mr. Durant, having nothing else to do, supervised the receipt and delivery of this lumber, to some extent, to the railroad company, and during that time he was introduced by Mattox, who was cashier of the parties interested in the million-tie contract, to Mr. Rogers, the present complainant, as one of the copartners. But when Davis
375 was about entering upon the performance of the second contract, or rather the attempt to obtain the second contract, he made overtures to the present defendant, William F. Durant, to become a member of the second enterprise, and Mr. Durant positively refused to have anything further to do with the delivery of ties, except with the completion of the million-tie contract.

This is shown, and is uncontradicted, and must be accepted as the facts in the case, and I conclude, from a careful examination of all the evidence in the case, that Mr. William F. Durant never was, in fact, a member of

the firm of J. W. Davis and Associates, who continued to deliver ties after the completion of the million-tie contract. The evidence shows that the million-tie contract was completed about the 30th of November, 1868, and at that time the cashier of the firm of the million-tie contract settled up with the railroad company for what ties had been delivered up to that time, and for the lumber and dealings of that firm with the railroad company.

376 The only question, then, that is left in the case—question of fact—is whether Mr. Durant so conducted himself as to make himself liable as a partner of the firm of J. W. Davis and Associates; so conducted himself towards those who were dealing with that firm as to make himself liable. Now, there is no evidence, that I can find, anywhere in the record of Mr. Durant's doing anything during the execution or delivery of the ties after the execution of the million-tie contract which shows that he had any interest in the delivery of ties beyond the execution and the delivery of the million ties. I can find no act of Mr. Davis which impliedly or expressly asserted that he had any interest in the delivery of ties under the firm name of Davis & Associates after the completion and delivery at Fort Saunders.

On the contrary all the affirmative evidence that is in the case is that Mr. Durant positively refused to become a member of that firm. The firm name was so radically changed after the completion of the million-tie contract as that it could not mislead creditors of the new firm, or leave them to suppose that the same parties continued to be members—

377 same parties of the old firm were members of the new firm.

The names are so radically different that it could not of itself suggest that the same persons was associated in the delivery of ties beyond Elk Mountain—west of Elk Mountain—as were associated in the million-tie contract.

It is very strongly urged by Mr. Whitney, in his argument, that Mr. Durant, having been a member of the million-tie firm, continued to be a member of the other firm because it was carried on and conducted by Davis, and that Gesner, and perhaps Sprague, had the management of it, and, therefore, the public, and those dealing with the new firm, would be led to suppose that it was the same association individually. He also urges that they used the same teams and machinery, the same outfits, as they are called in that western country, or camps and supplies, as the firm of Davis, Sprague & Co. had; but that is readily accounted for upon the supposition that Davis, as the leading and chief member of the original firm of Davis, Sprague & Co., would naturally be supposed to have made some arrangement with his copartners in the firm of Davis, Sprague

378 & Co. by which he would take the material on hand which were necessary for his purposes at some specific price or valuation and use them, continue to use them, in his new contract with the company. I don't see, certainly, how any conclusion of law would be derived from the mere fact that Davis used the same teams and camp outfits that were used by Davis, Sprague & Co. that Davis and Associates was necessarily composed of the same individuals.

Suppose it had been a commercial firm doing business in a store in this city or elsewhere, and the new firm had occupied the same store, but had

changed their firm name only; the old firm would not be held liable for the debts of the new firm because it engaged in the same business; perhaps with the same goods, in the same locality, and in the same store, and over the same counter as the old firm. There must be something more proved, it seems to me, than the mere fact that Davis took the property of the old firm to execute the contract which he subsequently obtained from the railroad company after the first contract was finished.

379 So that the proof, it seems to me, is not sufficient to show Mr. Durant has, by any act of his, caused the creditors of J. W. Davis and Associates to have good reason to believe him a member of this latter firm.

The record is barren of any proof that Durant, after the performance of the million-tie contract, had any interest in the further delivery of ties. The complainant in this case has the burden of proof. He is bound to make out his case clearly and by a preponderance of evidence, as he would in a suit at law—as if he had brought an action, a suit at law, against Mr. Durant as one of the members of this firm. He can have no benefit in this form of action in a court of equity over and above what he would have in a court of law upon the questions of fact, as to whether Durant was a member of this firm.

On looking into the testimony, as I have already reiterated, there is nothing that goes to show that Durant was a member of the new firm. There is evidence that Durant, some time in the year 1869, went out over the line of the Union Pacific Road and stopped at one or two

380 places, perhaps at Cheyenne and Fort Saunders, and stated that he was out for the purpose of getting a settlement with Davis, but that was always accompanied with the statement that he was there for the purpose of getting a settlement with Davis in regard to the million-tie contract, and there is no evidence that he was there for the purpose of getting a settlement with Davis in regard to any subsequent delivery of ties to the Union Pacific Road after the completion of the million ties.

So that the conduct of Durant shortly after he made this tour over the road, is in harmony with his conduct in going out to get the settlement with Davis. He filed a bill against Davis & Associates in the supreme court for the city of New York, alleging his partnership and interest in the million-tie contract, and demanding a settlement of the affairs of that company, and in the course of the litigation which grew up, which, as I have already said, became very complicated, and that court held that there were two firms and that the present defendant in this case was not

381 a member of the firm of J. W. Davis and Associates.

I think complainant only entered that court for the purpose of proving his right to participate in a fund that had been paid into that court, and was not really a party litigant to the issues, as to who were the members of the firm of Davis, Sprague & Co. and the firm of J. W. Davis & Associates. That court did find that there were two firms as a matter of fact.

Then, in conclusion, I will only add that I think the complainant has wholly failed in his proof to show that the defendant was a member in fact of the firm of J. W. Davis & Associates.

Secondly. He has wholly failed to show that credit was given to the firm of J. W. Davis & Associates, by reason of any act on the part of Durant which led persons to believe, or would induce the belief that he was a mem-

ber of that firm. Therefore I cannot believe that the complainant in this action gave credit to the firm upon the belief induced by the acts or something that was said or done by this defendant, that he was a member of that firm. Now, there was nothing between Rogers, the present
382 complainant, and the defendant Durant which would lead any cautious man to believe that Durant was a member of the firm which continued to deliver ties west of Elk Mountain, after the completion of the million-tie contract.

I find the record barren of any conduct on the part of Mr. Durant which would tend to that belief, and there is nothing in the case which would justify the belief. If the two firm names had continued the same perhaps Mr. Durant should have given notice that he no longer continued a member so as to have avoided liability to persons who knew of his connection with the old firm. But this firm of Davis, Sprague & Co. was created and organized for a specific venture, if it was a copartnership at all it was for one purpose, and that purpose being ended, they dissolved ipso facto, unless they agreed to continue longer, and in other undertakings. Now when the million-tie contract was completed the firm was dissolved unless they continued as copartners, under the same copartnership name, but unless a firm continued to do the same kind of business under
383 the same copartnership name in which event it might be necessary for the retiring members or the parties who had no interest to have notified the public in some way of their withdrawal, but, in this case, the firm dissolved, and a new firm was formed partially of the elements of the old firm, but with a new name, interested only in a new undertaking kindred in character it is true, to the first undertaking, but under the circumstances, it could not possibly mislead creditors.

Therefore I do not think that this creditor has shown by his proof that he gave credit to the firm of J. W. Davis & Associates on the belief that this defendant was a member of that firm, or that defendant was in fact a member of the firm.

The bill is dismissed for want of equity.

As I have already remarked, I think the case could be dismissed on a technical ground, but I prefer to dispose of it upon the broader ground.

(Endorsed:) Filed July 15, 1878. Wm. H. Bradley, clerk.

384 United States circuit court, northern district of Illinois.

THURSDAY, *November* 14, A. D. 1878.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS *vs.* JAMES W. DAVIS, JAMES H. GESNER, TIMOTHY P. RICHARDS, WILLIAM RUTH, WILLIAM F. DURANT, MORDECAI B. SPRAGUE, PIERSON S. MATTOX, and HENRY C. CRANE, trustee, &c.	In chancery.

Now comes the complainant by his solicitor and prays an appeal from the decree entered herein on the fifteenth day of July last to the Supreme Court of the United States, which is allowed by the court, upon

the complainant giving bond herein in the penal sum of five hundred dollars, with security to be approved by the court.

385 UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

In the circuit court of the United States, within and for the northern district of Illinois.

HENRY J. ROGERS, APPELLANT,
v.
WILLIAM F. DURANT, APPELLEE, impleded with James W. Davis et al.

Appeal from said court to Supreme Court of the United States.

It is stipulated by the parties hereto that the printed "abstract of case," which is hereunto annexed, contains a full, complete, and faithful exhibit of all the material parts of the pleadings, evidence, and exhibits in the case, except that the following-named documents are not sufficiently set forth therein, viz: Exhibit A to Cornelius Christopher's deposition; copy of record in suit in New York supreme court, offered and put in evidence by the defendant as Exhibit A; Exhibits K and L to Jonathan E. Wild's deposition; Exhibit K to Benjamin F. Bunker's deposition. It is likewise stipulated and agreed that the case was submitted to the court on the above record, and that the transcript of record to be certified to the Supreme Court of the United States on appeal, shall comprise and consist of, and said case shall be submitted to the Supreme Court of the
386 United States, upon the foregoing documents, viz: "Printed abstract of case hereto annexed; copy of Exhibit A to Cornelius Christopher's deposition; copy of record in suit in New York supreme court in case of Wm. F. Durant et al. vs. James W. Davis et al., put in evidence by defendant as Exhibit A hereto annexed; copies of Exhibits K and L to Jonathan E. Wild's deposition, and copy of Exhibit K to Benjamin F. Bunker's deposition; and that said above-named documents and transcripts, and copies as made up and certified by the clerk of this court, shall constitute the full record and shall be received and considered in said supreme court of the same validity and effect as if the entire record was set forth in extenso, and if consistent with the rules of court a copy of the opinion of the circuit court shall accompany said transcript.

HENRY C. WHITNEY,
Solicitor for Complainant.
LAWRENCE, CAMPBELL AND LAWRENCE,
Sol'rs for Wm. F. Durant.

(Endorsed:) Filed October 30, 1879. Wm. H. Bradley, clerk.

387 United States circuit court, northern district of Illinois.

FRIDAY, *October* 31, A. D. 1879.

Present, Hon. Henry W. Blodgett, district judge.

HENRY J. ROGERS
vs.
WILLIAM F. DURANT, IMPLEADED WITH JAMES W. Davis et al.

It is ordered that in making up the transcript of record in the above cause original Exhibits K and L annexed to Jonathan E. Wild's deposition, the same being two bank check-books and stubs, shall be transmitted with and form part of the record in the above entitled cause, and that the remainder of the transcript shall be made up and certified as provided in the stipulation between the parties, and filed October 30, 1879.

(Above exhibits on file in my office, see page 342—Clerk Sup. Ct' U. S.)

388 Know all men by these presents that we, Henry J. Rogers as principal, and William M. Van Nortwick as surety, are held and firmly bound unto William F. Durant in the penal sum of five hundred (500) dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly, severally, and firmly by these presents. Witness our hands and seals this thirtieth day of October, A. D. 1879.

The condition of the above obligation is such that whereas the said William F. Durant did, on the fifteenth day of July, A. D. 1878, in the circuit court of the United States for the northern district of Illinois, procure a decree for the dismissal at complainant's costs of a certain bill of complaint theretofore brought in said court by said Henry J. Rogers against said Wm. F. Durant, impleaded with sundry other parties, from which said decree of the said circuit court the said Henry J. Rogers has prayed for and obtained an appeal to the Supreme Court of the United States.

Now, therefore, if the said Henry J. Rogers shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against
389 him in case the said judgment shall be affirmed in said Supreme Court, then the above obligation to be void, otherwise to remain in full force and virtue.

HENRY J. ROGERS. [SEAL.]
WM. M. VAN NORTWICK. [SEAL.]

Approved,

H. W. BLODGETT, *Judge.*

(Endorsed:) Filed this thirty-first day of October, A. D. 1879. Wm. H. Bradley, clerk.

390 NORTHERN DISTRICT OF ILLINOIS, *set:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above

and foregoing to be a true, correct, and complete transcript of the record of the proceedings had in said court, made in conformity with the stipulation of the parties by their respective attorneys herein, filed October 30, A. D. 1879, and containing in addition thereto all of the orders of court entered of record in the cause wherein Henry J. Rogers is the complainant and William F. Durant et al. are the defendants, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 6th day of November, A. D. 1879, and of our Independence the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

391 HENRY J. ROGERS, APPELLANT,
vs.
WILLIAM F. DURANT, APPELLEE.

Appeal from the circuit court for the northern district of Illinois.

Assignment of errors.

And now comes the appellant, and by way of assignment of error saith, that in the record and proceedings and in the rendition of the decree for costs of the circuit court of the United States for the northern district of Illinois manifest errors have accrued; and for a more specific assignment of errors in this behalf the appellant shews and sets forth the following, to wit:

First. Said circuit court erred in finding, deciding, and determining that the proofs failed to shew that at the date of bringing this said suit the acceptances, drafts, and checques sued on were lost, and that a court of equity have not jurisdiction of said suit.

Second. The circuit court erred in refusing a decree granting the relief prayed for in appellant's bill.

Third. The circuit erred in rendering a decree dismissing appellant's bill and for costs against appellant.

Wherefore, for the errors aforesaid, and other errors apparent in the record and proceedings of the circuit court, appellant prays the Su-
392 preme Court that the finding and decision of the circuit court in this behalf and the decree of said court dismissing appellant's bill & for costs against appellant may be reversed, annulled, set aside, and wholly for nothing esteemed and held, and that said cause may be remanded to the circuit court with directions that the relief prayed in appellant's bill be granted; that a decree be entered in favor of the appellant for the amount due upon the acceptances, drafts, and checks in said bill set forth; and appellants pray' to be allowed their reasonable costs in this behalf expended.

HENRY C. WHITNEY,
Sol'r for Appellant.

393 By the honorable Henry W. Blodgett, one of the judges of the circuit court of the United States for the northern district of Illinois.

To William F. Durant:

Whereas, Henry J. Rogers has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the northern district of Illinois made in favor of you, the said William F. Durant, and has filed the security required by law: You are therefore hereby cited to appear before the said Supreme Court at the city of Washington on the second Monday of October next, A. D. 1881, to do and receive what may appertain to justice to be done in the premises.

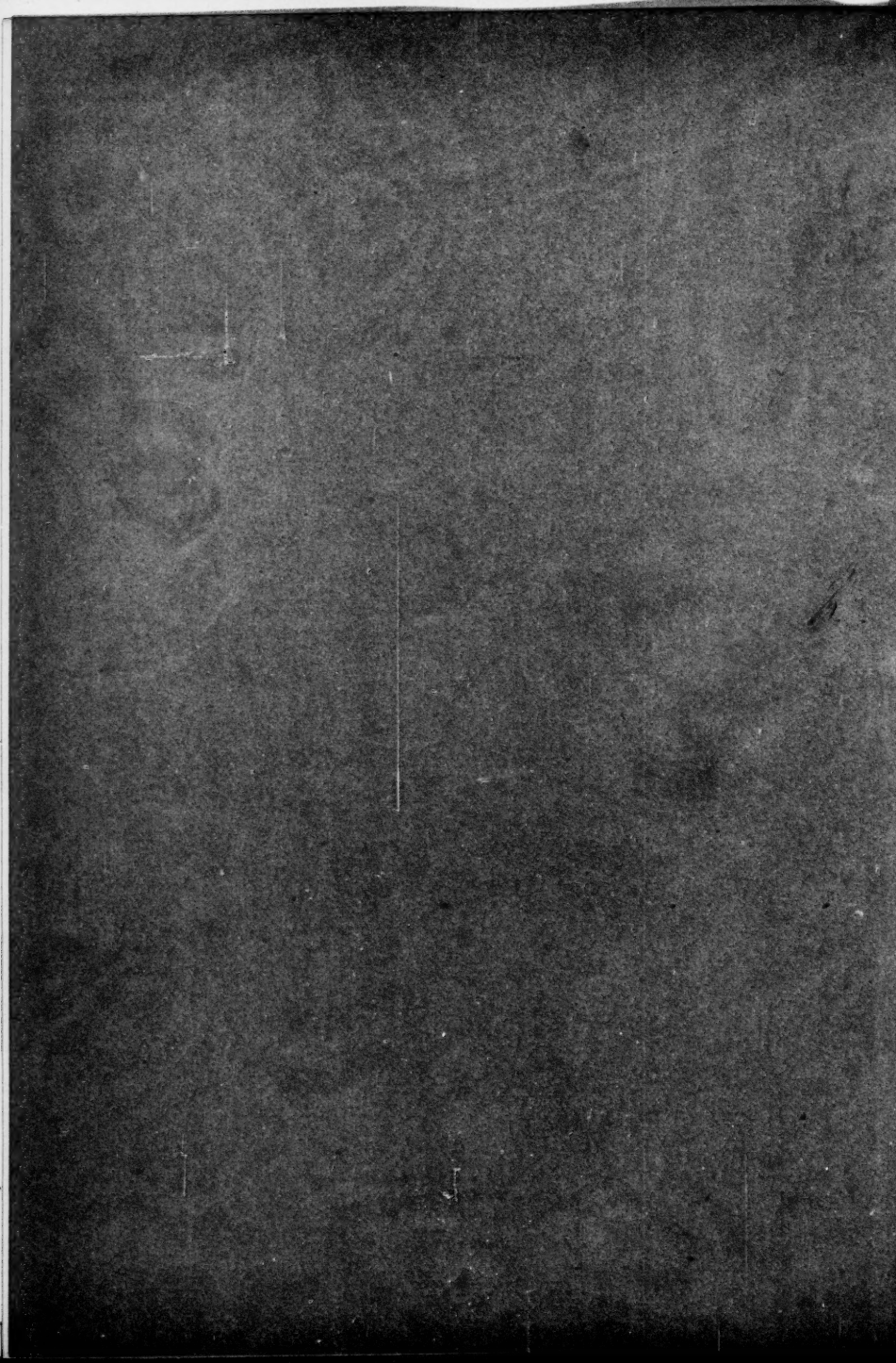
Given under my hand at the city of Chicago, in the northern district of Illinois, in the 7th circuit, the 18th day of May, in the year of our Lord eighteen hundred & eighty-one.

H. W. BLODGETT, *Judge.*

A copy of above received this 18th day of May, A. D. 1881.
LAWRENCE, CAMPBELL, & LAWRENCE,
Solicitors for Wm. F. Durant.

(Indorsed:) Sup. Court U. S. 1884, Oct. term. No. 427. H. J. Rogers, app't, vs. Wm. F. Durrant, impleaded with James W. Davis et al. Citation. Filed 27 June, 1881. Office Supreme Court U. S. Filed Jun. 27, 1881. James H. McKenney, clerk.

(Indorsement on cover:) No. 148. Henry J. Rogers, appellant, vs. William F. Durant, impleaded with James W. Davis & al. N. Illinois, C. C. U. S. Filed 13th November, 1879.



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JAMES H. McKENNEY, Clerk.

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1882.

HENRY J. ROGERS,
Appellant.
vs.
WILLIAM F. DURANT, *impleaded with* JAMES W. DAVIS, *et al.*
Appellee.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF OF APPELLANT.

Lewis L. Coburn,
Henry C. Whitney,
Solicitors for Appellant.

CHICAGO:
MACGREGOR & WHITNEY, PRINT. 66 ASHLAND BLOCK.
1882.

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OCTOBER TERM, A. D. 1882.

HENRY J. ROGERS, *Appellant.* *vs.* WILLIAM F. DURANT, *impleaded with* JAMES W. DAVIS, *et al.* *Appellees.*	*Appeal from the Circuit Court of the United States for the Northern District of Illinois.*

BRIEF OF APPELLANT.

I.

STATEMENT OF THE CASE.

This was a suit in Equity, brought by the Appellant against William F. Durant, (the Appellee) and James W. Davis, Mordecai B. Sprague, Pierson S. Mattox, William Ruth, Timothy P. Richards, James H. Gessner and Henry C. Crane, Trustee for Wilhemina Davis Train, jointly composing the firm of "James W. Davis, and Associates."

The Bill alleges that the Complainant acquired *bona fide* by purchase for value in the usual course of business, some twenty several pieces of commercial paper of an aggregate

face value of $33.672.72 made, drawn or accepted, (as the case may be) by a firm called "James W. Davis and Associates," the earliest, bearing date April 12th 1869, and the latest, bearing date February 21st 1870—that the same were not paid—and that the Complainant is still the owner thereof.

It names the above described individuals who composed that firm, among whom was William F. Durant, who is the only Defendant served, and who appeared in Court by his Counsel and made answer.

The Bill further alleges that the said commercial paper has been lost, and that the Complainant has no copy thereof; and that he cannot set out the same as required by the laws of Illinois, in case of a common law suit. Whereupon he seeks relief on the Equity side of this Court.

The Appellee sets up the following matters of defence in his answer.

I. That a Court of Law is competent to afford relief.

II. That Complainant is not the owner of the paper.

III. That Durant was never at any time a partner of the firm of James W. Davis & Associates, and that his contract relating to the tie business was in name of "Davis Sprague & Co.," and was *not* a contract of partnership.

IV. That the issue of his being a partner of James W. Davis and Associates has been heretofore made and decided in the negative, in a suit in New York, to which complainant was a party, and is therefore *res judicata*.

V. And that he never held himself out to the world as being a partner of James W. Davis and Associates, so as to be chargeable, independant of the actual fact of partnership itself.

The proofs being quite voluminous by stipulation the case was submitted to the Circuit Court upon a printed Abstract of Evidence, and Exhibits; and a decision rendered by Blodgett, Judge, on July 15th 1878, dismissing the Bill for want of Equity: from which decision the Appellant, being Complainant below, prosecutes his appeal to this Court.

The firm of James W. Davis and Associates was constituted for the business, and in the mode, following, viz: On November 19th 1867, James W. Davis wrote and caused to be delivered, to the authorities engaged in the construction of the Union Pacific Railway, a communication in the following terms, viz:

COZZENS HOTEL, OMAHA,
Nov. 19th, 1867.

S. B. REED,
Supt., &c., or Committee:

SIR: On behalf of myself and associates I propose to furnish your company with ties as follows: 100.000 to be delivered on the line of road in the vicinity of Ft. Saunders, at 70c. each (50.000 of above, if that amount can be obtained in the canons of Black Hills, at 65c. each); 100.000 on the line of road at or near the Big Laramie River, at 70c. each; 200.000 on line of road at or near the Big or Little Laramie River, to wit, 100.000 at 75c. each, and 100.000 at 80c, each; 600.000 on line of road at Little Laramie River, North Platte River, or intermediate points, to wit, 300,000 at 90c. each, and 300.000 at 95c. each.

If prices are satisfactory, the details of contracts, time of delivery, &c., can be arranged at once, and if required security will be given for its performance to the amount of $100.000. If this is accepted, we will purchase the present

outfit of the Company now at Saunders, and assume the payment for the ties.

We will also purchase the saw-mill at a fair price, and furnish all lumber it will cut for the next twelve months (if required) delivered on line of road at forty-two dollars per thousand feet.

We will also furnish such timber as may be required at Dale Creek Bridge, say, three hundred thousand (300.000) feet, at $40 per M, and 300.000 feet, at $45 per M.

It is understood that the arrangements, in regard to transportation of men and outfit, shall be the same as in former contracts, and that we shall have exclusive right to the timber.

JAMES W. DAVIS,
For Self, Sprague, and others.

P. S.—Will furnish hewed timber, 25 feet in length and under, delivered at a convenient point west of Saunders, for forty dollars per M.

JAMES W. DAVIS,
For Self and Associates.

Outfit shall be construed to mean wagons, teams, harness and men, and does not include provisions, hay, feed or groceries.

On November 20th 1867, Sidney Dillon and T. C. Durant, Trustees, on behalf of the Union Pacific Railway, replied as follows.

OMAHA, NEB., Nov. 20th, 1867.

TO J. W. DAVIS AND ASSOCIATES:

GENTLEMEN: Your proposition to furnish this Company with ties and timber, delivered at different points on the line of road and dated November 19th, 1867, is accepted, and a contract will be drawn up embracing details, conditions, specifications, and explanations not sufficiently set forth in the proposition, substantially as follows:

1st CONDITION.—The ties are to be delivered at the several points in such quantities as will furnish the road west-

ward to the next point where ties are delivered or beyond, the object being simply to prevent the hauling of ties by the railroad company eastward and to fill up any deficiency.

2d CONDITION.—The term outfit, when the same is used in the clause relating to the transportation by the company over their line, shall be construed to mean men, tools, and teams.

3d. All expenses of outfit (as per bills) pertaining either to the ties now being cut at Laramie River, or the saw-mill at this point or other places, when the same are used or incurred in the performance of that portion of work assumed by contractors, including cost of houses at Fort Saunders, shall be charged to them at cost, with such rates of freight as the railroad company may charge others for same kind of transportation.

The price of saw-mill to be fixed at $3.500; you to take two or four of the mules and wagons intended for Dale Creek at cost.

4th. The railroad company reserves the right to deduct from the number of ties proposed to be delivered at Fort Saunders and in the vicinity, and intended to be procured from the places in the Black Hills and vicinity where Messrs Turner & Paxton, Gilmore & Carter, Evans & Shortwell are at work, such quantities as this committee may agree upon as a compromise with the said parties; and nothing in this contract relative to the exclusive right of timber shall interfere with said committee giving consent to the procuring of such amount as may be agreed upon at these points to affect that compromise.

The company to charge the contractors and deduct from the estimate the cost up to the present time of labor on ties, saw-mill, and cost of hauling.

Payments to be made on monthly estimates as ties are delivered; and in case the contractors haul them a portion of the distance and pile them up for inspection, to be delivered on road in the spring, a fair estimate shall be made and payments made thereon; but no payments shall be made on ties simply made and laying in the woods and hewed; but all ties shall be at the risk of contractors until delivered on the line of road.

It is understood that timber shall be got out according to bill. The contractors may go on with the work if they consent to the above; but the contract, after being drawn, shall be sent to New York to be approved and executed.

(Signed,) SIDNEY DILLON,
T. C. DURANT,
Committee.

On November 20th, 1867, a written assignment to Appellee was made and received by him as follows, viz ;

OMAHA, Nov. 20, 1867.

For a valuable consideration I hereby assign to William F. Durant, of Chicago, Illinois, the undivided three-tenths of a certain contract with H. C. Crane as secretary of trustees, for delivery of one million of ties and lumber required by said trustees under said contract.

This agreement extends also to all merchandise purchased and sold under said agreement, and all profits incidental thereto. I hereby agree, for myself and associates, to pay over when required unto the said William F. Durant, or his agent, any dividends which may hereafter be declared under said contract, and duly admit him as a copartner equal to three-tenths interest in said contract.

In witness whereof I have, on this 20th day of November, A. D. 1867, for myself and associates, affixed my hand and seal.

JAMES W. DAVIS AND ASSOCIATES.
By JAMES W. DAVIS, *Attorney.* [SEAL.]

[5 cts. I. R. stamp, cancelled.]

On November 22d, 1867, written assignment of one-tenth interest in said contract was made by James W. Davis and associates, to M. B. Sprague.

On December 3d, 1867, a written contract was made, in order to give effect to the memoranda of agreement; and signed by H. C. Crane, secretary for the trustees, (of the U. P. Ry.) and by the other contracting party as follows: "J. W. Davis, for self and associates."

On January 8th, 1868, a written assignment of one-twentieth interest in said contract was made to James H. Gessner, in the following words and figures.

Whereas, on the 29th day of November, 1867, James W. Davis, of Nebraska, entered into a certain contract in writing with the trustees and contractors for the construction of Union Pacific Railroad, for the cutting and delivering on the line thereof of one million ties and two million feet of lumber, at certain prices therein designated, to which written agreement of date aforesaid this certifcate specially refers:

Now, be it known, for a valuable consideration to me in hand paid, James H. Gessner, of the State of Nebraska, is this day admitted by me as a copartner, to the extent and limit of one-twentieth interest in all profits as well as all losses accruing from or in any way arising out of such written contract so made as aforesaid by James W. Davis, representing the firm of James W. Davis and his Associates.

It is expressly agreed and understood that James H. Gessner shall give his personal and active aid in securing the successful prosecution of all works or duties hereafter to be assigned him by the general superintendant in charge of said works; and for such services so rendered as aforesaid a just and reasonable compensation, to be paid by James W. Davis, shall be allowed said Gessner, the same to be paid monthly.

Said Gessner shall be removed only for legal cause; but in the event of such removal, only for good and sufficient cause, no rights of said Gessner in said contract, as attested by their certificate, shall be impaired or forfeited.

Upon the surrender of this certificate unto James W. Davis, dividends may hereafter be declared and paid over, under and with the approval of the majority in interest, who hold such written evidence of interest in such contract.

In testimony whereof, I have, on this the 8th day of January, 1868, at the city of Omaha, and State of Nebraska, for myself and my said associates, affixed my hand and seal,

JAMES W. DAVIS, *Trustee.*
JAMES W. DAVIS AND ASSOCIATES.

It is understood that timber shall be got out according to bill. The contractors may go on with the work if they consent to the above; but the contract, after being drawn, shall be sent to New York to be approved and executed.

(Signed,) SIDNEY DILLON,
T. C. DURANT,
Committee.

On November 20th, 1867, a written assignment to Appellee was made and received by him as follows, viz ;

OMAHA, Nov. 20, 1867.

For a valuable consideration I hereby assign to William F. Durant, of Chicago, Illinois, the undivided three-tenths of a certain contract with H. C. Crane as secretary of trustees, for delivery of one million of ties and lumber required by said trustees under said contract.

This agreement extends also to all merchandise purchased and sold under said agreement, and all profits incidental thereto. I hereby agree, for myself and associates, to pay over when required unto the said William F. Durant, or his agent, any dividends which may hereafter be declared under said contract, and duly admit him as a copartner equal to three-tenths interest in said contract.

In witness whereof I have, on this 20th day of November, A. D. 1867, for myself and associates, affixed my hand and seal.

JAMES W. DAVIS AND ASSOCIATES.
By JAMES W. DAVIS, *Attorney.* [SEAL.]

[5 cts. I. R. stamp, cancelled.]

On November 22d, 1867, written assignment of one-tenth interest in said contract was made by James W. Davis and associates, to M. B. Sprague.

On December 3d, 1867, a written contract was made, in order to give effect to the memoranda of agreement; and signed by H. C. Crane, secretary for the trustees, (of the U. P. Ry.) and by the other contracting party as follows: "J. W. Davis, for self and associates."

On January 8th, 1868, a written assignment of one-twentieth interest in said contract was made to James H. Gessner, in the following words and figures.

Whereas, on the 29th day of November, 1867, James W. Davis, of Nebraska, entered into a certain contract in writing with the trustees and contractors for the construction of Union Pacific Railroad, for the cutting and delivering on the line thereof of one million ties and two million feet of lumber, at certain prices therein designated, to which written agreement of date aforesaid this certifcate specially refers:

Now, be it known, for a valuable consideration to me in hand paid, James H. Gessner, of the State of Nebraska, is this day admitted by me as a copartner, to the extent and limit of one-twentieth interest in all profits as well as all losses accruing from or in any way arising out of such written contract so made as aforesaid by James W. Davis, representing the firm of James W. Davis and his Associates.

It is expressly agreed and understood that James H. Gessner shall give his personal and active aid in securing the successful prosecution of all works or duties hereafter to be assigned him by the general superintendant in charge of said works; and for such services so rendered as aforesaid a just and reasonable compensation, to be paid by James W. Davis, shall be allowed said Gessner, the same to be paid monthly.

Said Gessner shall be removed only for legal cause; but in the event of such removal, only for good and sufficient cause, no rights of said Gessner in said contract, as attested by their certificate, shall be impaired or forfeited.

Upon the surrender of this certificate unto James W. Davis, dividends may hereafter be declared and paid over, under and with the approval of the majority in interest, who hold such written evidence of interest in such contract.

In testimony whereof, I have, on this the 8th day of January, 1868, at the city of Omaha, and State of Nebraska, for myself and my said associates, affixed my hand and seal,

JAMES W. DAVIS, *Trustee.*
JAMES W. DAVIS AND ASSOCIATES.

And on November 20th, 1868, a written assignment was made to T. P. Richards, P. S. Mattox and H. C. Crane, Trustee for W. D. Train, of three-tenths of said contract: which assignment was signed, "James W. Davis and Associates, By James W. Davis, Attorney." [SEAL.]

And at some date which the record does not disclose, James W. Davis made a written assignment of one-twentieth interest in said contract to William Ruth.

This association, at once, upon the execution of the first correspondence, commenced operations thereunder; James W. Davis and Mordecai B. Sprague assumed charge of the business as managing partners; Pierson S. Mattox acted as Cashier for the firm until the latter part of February 1869. None of the other partners had anything to do with the actual management of the firm, except the Appellee William F. Durant, who opened and managed a lumber yard for the firm at Ft. Saunders, for a short time in 1868.

The contract which formed the business of this copartnership, was called the "million tie" contract: some confusion and indefiniteness seems to have prevailed as to the nomenclature of the firm, and a prominent element of defense arises from this circumstance.

The Banking business of the association was transacted up to June 25th, 1868, at the Bank of Kountz Bros. & Co., in the name of "B. F. Bunker, Cashier." After that date, the Bank business was transacted at the several Banks of Kountz Bros. & Co., at Cheyenne, Rogers & Co., at Cheyenne, H. J. Rogers & Co., at Laramie, and Wilson & Morton at Echo: and in every instance, it was transacted in the name of "James W. Davis and Associates."

The receipts for money from the Union Pacific Railway Company, were all taken in the name of "James W. Davis and Associates," except for a short time at first.

The Trustees of the Union Pacific Railway knew this association only as "James W. Davis and Associates."

The Chief Engineer of Construction of the Union Pacific Railway Company, knew the association only as "James W. Davis and Associates."

Still, many of the operations of the firm seem to have been carried on in the name of "Davis, Sprague & Co." Many Drafts were drawn in that name: and receipts and time checks were made and taken in that name. Freight was shipped to the firm by either name indifferently.

James W. Davis the chief managing partner of the firm from its inception to the close of its operations, thus states the facts about the names of the firm, under oath, in one of Appellee's exhibits, viz: "No firm name of the said parties "was ever agreed upon, or adopted by them, but they first "assumed the style of 'Davis, Sprague & Co.,' and in their "dealings with all parties, save the said Defendants trustees "they for a long time used that style, but the said trustees "from the first, kept their accounts with Davis and his co-"partners, in the name of 'James W. Davis & Associates,' "and afterwards the entire business of said firm was tran-"sacted under that style. But the two names of 'Davis, "Sprague & Co.' and 'James W. Davis and Associates,' "described but one firm and one set of parties only, and "from the making of said contract down to the present "time, (Oct. 11, 1870.) but one firm has ever existed, en-"gaged in executing said contract."

The delivery of one million ties was concluded in the Fall of 1868; and a point was reached on the line called Elk Mountain. At this time the road was not nearly completed, and a large quantity of ties, the property of James W. Davis and Associates, were still on hand. Mattox, one of the partners, testifies that a general settlement was

had with the railway on November 1st, 1868. He likewise testifies that James W. Davis, the principal managing partner on behalf of the firm of "Davis, Sprague & Co.," sold said surplus ties to the firm of "James W. Davis and Associates," which latter firm, he says, was a new concern, started after the performance of the "million tie" contract, and consisting of James W. Davis and James H. Gessner: and that James W. Davis acting for the firm of James W. Davis and Associates, bought these ties from himself, representing the moribund firm of Davis, Sprague & Co.

Christopher, the book-keeper of James W. Davis & Associates, testifies that there was no settlement at all when the million tie contract ended, and no change at all, but that the original firm kept on furnishing ties till the road was completed.

Reed, the superintendent of construction of the Union Pacific Railroad Co., testifies that there was no settlement and no change, but that the delivery of ties was continuous till the end of the road was reached.

Thomas C. Durant and Sidney Dillon, in an Exhibit put in evidence by the Appellee, swear that after the "million tie" contract had been performed, "the said Davis offered "and proposed *on behalf of himself, and his partners or "associates*, to sell and deliver to these defendants, as "Trustees, ties and lumber at certain prices," &c., "that "they accepted said proposal and agreed to pay the prices "fixed upon."

The road was finally completed in May 1869, and on September 26th, 1870, a proceeding was instituted in the Supreme Court of New York by the Appellee herein, William F. Durant, M. B. Sprague and P. S. Mattox, Complainants: against Timothy P. Richards, James W. Davis,

James H. Gessner, William Ruth and Henry C. Crane, composing, as was alleged, with complainants the firm of James W. Davis and Associates, and other persons; the avowed object being to procure a dissolution of the firm of Davis, Sprague & Co. and James W. Davis and Associates, and praying for an accounting and a settlement with the Union Pacific Railway Company.

In the course of litigation in this case, an order was made on November 11th, 1870, "that all persons, parties and "corporations, having claims against the firms of 'Davis, "Sprague & Co.' and 'James W. Davis and Associates,' or "either or both of said firms, present the same, together "with their proofs, in support of the validity thereof, to the "referee; and that any claim against either of said firms not "so presented, shall be excluded from participation in the "fund in question," &c.

The Appellant herein, presented his claims under this order, and after litigation upon them, they were allowed, but not all of them in full: the curtailment being as follows, viz;

Draft of C. A. Henry for $945.99—allowed $888.38
" " J. W. Young & Co. for $10.000—allowed $5376.00

And upon the allowance of the several claims made, the Appellant received 15½ per cent. in payment *pro tanto*; such being his share or pro rata of the fund.

It was also found and adjudged in this case that the firm of James W. Davis and Associates and that of Davis, Sprague & Co. were distinct; and that the operations of the latter were limited to the performance of the "million tie" contract; and that the firm of James W. Davis & Associates, consisting only of Davis and Gessner, commenced its operations after the delivery of one million ties, and that the paper in suit was not issued in and about the furnishing one million ties.

It was likewise found and adjudged "that in the execu-"tion of said 'million tie' contract * * the operations were "carried on sometimes under the style of 'Davis, Sprague "& Co.' and sometimes that of 'J. W. Davis & Associates.'"

The first substantial ground of defense is, that the Appellee's connection with any contract terminated with the completion of the delivery of one million ties in the Fall of 1868,—that the name of the firm of which he was a member was Davis, Sprague & Co.; and was not, at any time, known as James W. Davis and Associates—that the paper in suit was dated after the dissolution of the firm of Davis, Sprague & Co. and was not for debts of that firm; likewise that his connection with the contract was not one of partnership.

The reply of Appellant is, that but one firm executed the contract for ties—that it was known by both the names of "Davis, Sprague & Co." and also "James W. Davis and Associates" indifferently: and that it was not dissolved when one million ties had been delivered, nor, in fact, till the whole line had been furnished with ties: that from the nature of the undertaking and the connection of the various members therewith, it was necessarily and legally a contract of partnership; and finally, that no notice was ever given to Appellant that Appellee had ceased to be a partner, even if the original firm had been, as between the partners themselves, dissolved.

The second substantial ground of defense is, that this suit in New York was, by the presentation and allowance of his claim, *res judicata* and a bar to any further suit there upon.

The reply is, that Appellant was not a *party* to that suit; and the court below so found, expressing this opinion as follows: "I think Complainant only entered that court

"for the purpose of proving his right to participate in a "fund that had been paid into that court, and was not "really a party litigant to the issues, as to who were the "members of the firm of Davis, Sprague & Co., and the "firm of J. W. Davis and Associates."

The two defences interposed and the replications thereto, it is believed, present and encompass the entire litigation in the case.

ASSIGNMENT OF ERRORS.

1st. Circuit Court erred in finding, determining and deciding that the proofs failed to shew that at the date of bringing this suit, the acceptances and drafts sued on were lost, and that a Court of Equity had not jurisdiction of said suit.

2d. Circuit Court erred in finding and adjudging that Appellee was not a member of the firm of James W. Davis and Associates, who continued to deliver ties to the Union Pacific Railroad after the delivery of the first million, and hence liable upon the paper in suit.

3d. Circuit Court erred in finding and adjudging that Appelle did not so conduct himself toward those dealing with the firm of James W. Davis and Associates as to make himself liable as a partner in said firm as to them.

4th. Circuit Court erred in finding and adjudging that credit was not given to the firm of James W. Davis and Associates by reason of the acts of the Appellee inducing Appellant to believe that he was a member of that firm.

5th. Circuit Court erred in refusing a decree granting the relief prayed for in Appellant's Bill; viz: that he recover against Appellee the amount of principal and interest due on the paper in suit.

6th. The Circuit Court erred in rendering a decree, dismissing Appellant's Bill, and for costs against Appellant.

BRIEF OF THE ARGUMENT.

Was the paper sued on, *lost* in the sense of the law, which would authorise a Court of Chancery to assume jurisdiction and grant relief?

The proof is as follows;

APPELLANT TESTIFIES, (Record p. 12.) "I had "the commercial paper, of which I have given a list, in my "possession up to the time it was presented to the Referee "in New York. I gave it to my attorney. I haven't seen "any of it since I gave it to him to file with the Referee in "this suit as requested."

He likewise says, (Record p. 11.) "through my attorney "William E. Stiger, I presented the commercial paper, "which I have stated, I owned," &c.

And again, (Record p. 18.) "William E. Stiger appeared "solely for me in the New York suit."

WILLIAM E. STIGER TESTIFIES: (Record p. 20.) "Was employed by complainant (Rogers) to bring an ac- "tion against William F. Durant and others, for the collec- "tion of certain drafts, checks and accounts," &c.

(Record p. 21.) "I had possession of the commercial pa- "per and accounts on which the suit was based, in 1871." * * "I had received them from Rogers." (Appellant.) * * * "I filed it with A. A. Redfield, the Ref- "eree, in an action pending in the Supreme Court of the "State of New York, wherein William F. Durant and oth- "ers were defendants. That was in the Spring or Summer of "1871. I have not seen any of the commercial paper since. "I have endeavored to find it, and first applied to B. F. "Bunker who was clerk for the Receiver in the cause, "Francis M. Bixby, and failed to obtain them from him. I "also applied to Mr. Redfield, the Referee, and failed to "obtain it from him. Also to Clark Bell, who was Dur- "ant's attorney in this suit; and to Mr. Bixby, the Receiv- "er, but did not get it. I wanted this paper for the use of "Rogers. I don't know where it is now." * * "I made "my last attempt to regain possession of this paper in "April or May, 1873."

Q. "Did you notify Rogers of your inability to re- "cover it?"

(*Objected to.*)

A. "I did."

And again, the same witness testifies: (Record p. 23.) "I have never seen the commercial paper of which I gave "a list, since I filed it with the Referee," I never succeeded "in tracing it up, but believed it was in Clark Bell's posses- "sion. Whether my belief was well founded I couldn't "say. I believed so, because I was told by the Referee and

"Bunker, the clerk of the Receiver, that the rule requiring "original papers to be filed, was suggested by Clark Bell, "and that he had complied with the rule, and, subsequently "Bunker informed me that the original papers which Bell "had filed, had been taken from the files and copies inserted "in lieu thereof. When I inquired of Mr. Bell for those pa- "pers, if he had them in his possession, he replied, 'I don't "know whether I have or not; if I have I wont give them "to you. I don't think you are entitled to them.' I also "knew him to be Durant's attorney, and it was for his in- "terests to have these papers removed or destroyed, so that "no action could be brought upon them against Durant in "favor of Rogers."

AMASA A. REDFIELD, the Referee, testifies: (Record p. 42.) "to the best of my recollection, those evidences "of Roger's claims, were given to B. F. Bunker. * * * "I think I have Bunker's receipt for all those papers, signed "by him for Bixby as Receiver, I dont know whatever be- "came of those documents ultimately. I think Stiger has "applied to me for them within the last year. * * * "Don't think he got them from me."

And Mr. Clark Bell was a witness for Appellee after the above evidence was given, but was not asked about the missing paper or his connection with it.

From the above testimony it would appear that the last custody of the lost paper, was that of the Appellee's attorney, Mr. Clark Bell, in another proceeding, and in another Court, it is true, but still concerning this identical lost paper.

Mr. Rogers, the Appellant, is a citizen of Wisconsin and this suit was brought in Illinois. This paper was carried by the Appellant to New York for a legitimate purpose; and in some way fell in the hands of the Appellee's attorney

who upon importunity from Appellant's counsel, impliedly admitted its custody, but refused to surrender it to him.

It would seem clear, that if the Appellee's technical objection should now prevail, to the extent of dismissing the Bill upon this technical ground, that there would accrue a violation of the maxim that "no man can take advantage "of his own wrong." The Appellee, by his attorney, Bell surreptitiously gained manual possession of this paper, and held it against the request of Appellant, its owner.

Even if the objection be well founded, abstractly considered, that Appellant did not use sufficient diligence and force to procure it from the attorney of Appellee, it would seem that it should not be enforced in a Court of Equity in this cause when the loss of the paper was through the wilful contrivance of Appellee's counsel, for the benefit and behoof of the Appellee.

Appellant certainly used reasonable diligence in trying to find this lost paper: the paper was lost in New York: while Appellant was a citizen of Wisconsin. He employed a reputable lawyer of the place where the paper was lost, to regain it for him; and the lawyer took such measures as he considered proper and needful to achieve that object. The Appellant should not suffer if the course pursued by his attorney was not the most efficient mode: the Appellant certainly used all the diligence which the law enjoins, by employing a reputable attorney and adhering to his action.

The test is, whether the paper was lost *when* suit was brought; and lost so far as *Appellant* was concerned. It does not matter if *Appellee* knew where the paper was: or even if it was in *his* custody. It was then *lost* to Plaintiff: and through the malign and hostile act of Appellee's counsel, acting in the interests of Appellee. It does not mat-

ter if the proof taken in this case should disclose where this paper was, or now is; the only test is this: did Appellant living in Wisconsin use all reasonable means to find this paper in New York, where it had disappeared: he employed a reputable lawyer; and the lawyer exhausted his resources, and so reported to Appellant: and Appellant was justified at that time in considering it as *lost*: and Appellee's wrongful action in depriving him of it, should not now be rewarded by this Court. And it *still* remains absolutely lost to Appellant.

It has been held that where reasonable diligence has been used in searching for a paper in those places where by law it may be presumed to have been deposited, and by making inquiries of those persons who may be legally presumed to have the custody of it, without success, its loss or destruction will be presumed.

Fretwell vs. Monow, 7 Ga. 264.

Concerning the proof of loss "the Courts will be less ex-"acting as to the measure of proof of loss or destruction "where the maker is safe against any future claim of a *bona* "*fide* transferee."

Swift vs. Stevens, 8 Conn. 431.

And in this case the paper was all long past due before it was lost: and could not be the foundation of a claim by a bona fide transferee.

Moreover, the decision which is to be reviewed, did not embrace this technical question; the decision was upon the *merits*, and this Court should also review the decision upon the *merits*. Had the lower Court dismissed the Bill upon the technicality suggested, Appellant could have at once have proceeded in a proper mode to collect the debt; but as the case was adjudged upon the *merits*, no relief was

possible to the Appellant but to ask a review here upon the very grounds upon which the adjudication was had.

Protesting therefore, that Appellant has made out a complete case of *loss* to confer jurisdiction upon this Court: and that the action of the Appellee, through his counsel, in reference to said loss, should estop him from making this purely technical defence: we nevertheless cannot escape from the conclusion that this Court should review only the *decision* of the lower Court upon the broad ground of whether the Bill was sustainable on its *merits*.

II.

DID APPELLANT *OWN* THIS PAPER SUED ON: AND WAS IT DUE AND UNPAID?

The evidence is as follows, viz:

APPELLANT TESTIFIES: (Record p. 10.) "Rogers "& Co. in the regular course of business, became owners of "certain acceptances of James W. Davis and Associates, "which were not all provided for by them, as follows:

(Paper in suit.)

"These acceptances, checks and drafts *now belong to me*. "I have owned them individually very nearly since the date "of them, having acquired them by purchase in the regular "course of business;" * * "This paper was at Cheyenne "at its maturity, and all those checks, acceptances and "drafts were presented, and protested for non-payment. "There was no funds to meet this paper. The way I got "these checks was this; they were drawn on a bank, and "protested and I bought them." (Record p. 11.) "there was "no funds to meet this paper."

The Appellant further testified, on cross examination; (Record p. 15.) "I became the purchaser, out and out, of "each and all the twenty pieces of paper" (that in suit) "enumerated in my direct examination."

J. E. WILD, (Clerk for Appellant) testifies: "We "handled a good deal of their paper * * (James W. "Davis and Associates) it came to Rogers & Co. through "their customers generally. * * * Rogers & Co. con- "tinued to receive this paper in the course of business, "down to the Spring of 1870." (Record p. 123.)

WILLIAM E. STIGER, TESTIFIED; "I had pos- "session of the commercial paper. * * * I had re- "ceived them from Rogers." (Record p. 21.)

CORNELIUS CHRISTOPHER, TESTIFIED; (Record p. 48.) * * "Cashier of the concern." * * (Record p. 50.) "I know of Rogers (Appellant) discounting, or "otherwise becoming the owner of quite a large amount of "James W. Davis and Associates' paper, which was not "paid. * * "

> "The witness is here shown printed copy of the "complaint," &c. * * "and asked to identify the "commercial paper therein described as being that "which was not paid. The witness states:"

"I can't recollect all these accounts: some of them I can, "although the names are not given: on reading from page "3. I can identify them all, since the names are given."

On cross examination the same witness says, on looking at the document marked "H. J. Rogers, Exhibit B." (list of claims in suit) "I recognize all the names; and from mem- "ory the opposite amounts, having copied them a great "many times. I think Rogers became the owner of all "these by purchase."

The *possession* of the paper, unimpeached, draws to it all the incidents essential to a recovery.

The law on this subject has been so often and clearly set forth by this Court and other Courts, as to scarcely need reference.

Goodman vs. Simonds, 20 How. 343.
Bronson vs. La Crosse Co. 2 Wall. 283.
Bank of Pittsburgh vs. Neal, 22 How. 96.
White vs, R. R. 21 How. 525.
Keeny vs. Chilis, 4 Greene, 416.
Bank vs. Rowe, 19 N. Y. 20.
Brainerd vs. R. R. 25 N. Y. 496.
Gould vs. Venice, 29 Barb. 452.
Illinois vs Delafield, 8 Paige 527.

And it has likewise been held specifically by this Court that, "bad faith in the acquisition of negotiable bonds * * "implies guilty knowledge or wilful ignorance, and the bur- "den of proof lies on the assailant of the title."

Hotchkiss vs. National Banks, 21 Wall. 354.

Again ;

"The purchaser of a negotiable instrument in open mar- "ket, and in the usual course of business is not bound to "make a critical examination to escape the imputation of "bad faith in the purchase."

Birdsall vs. Russell, 29 N. Y. 220.

The only exception ever made in the books to these established rules has been, that when the defendant shews affirmatively that the instrument sued on was lost or stolen, or obtained, or put in circulation fraudulently, in such case the Plaintiff must shew that he gave value for the paper, not having notice.

When suitors count upon commercial paper which they have purchased, they ordinarily sustain their case by exhibiting it in court; or, as in this case, proving its original possession and subsequent loss. This the Appellant has not only done, but he has likewise proved it by the evidence of two witnesses.

The Cashier of the firm of which the Appellee was a partner, shews the reasons why payment of these drafts and acceptances was not promptly made: (Record p. 52.) "the reason all this commercial paper was not paid, was "because we could not get the money from the rail road "company. I mean to say that neither Rogers & Co., nor "H. J. Rogers & Co., had the money in their possession to "pay the checks drawn upon them." * * * "They "(drafts for $133.000.) were deposited with Rogers upon a "special understanding: which was, that when collected, "they were to be paid out upon checks of Davis & Asso- "ciates. The paper (in suit) was not drawn against that "fund, because, at that time, there was more of their paper "out, than would consume these two drafts; and I was di- "viding up the money as carefully as I could between all "the creditors proportionately: Davis and I checked out "the amount of those two drafts about the time they fell "due." (Record p. 53.) "I think some checks were given "in advance, and Mr. Rogers cashed them. * * * "It is not a fact that, for nearly all the time from May 8th "1869, till in August or September 1869, James W. Davis "and Associates had a credit balance with either Rogers & "Co. or H. J. Rogers & Co. I think we were all the time "overdrawn, not taking into account those drafts not yet "matured."

Appellee puts in evidence the Record in the New York suit of "William F. Durant, et als vs. James W. Davis, et "als." and in the course of that suit the Appellant was en-

titled to submit his claims in order to be authorised to participate in the fund: and altho' Appellant was not a party litigant in such a sense as to conclude him from further litigation (Evidence of B. F. Bunker, pp. 82, 85.) as was found in this case by the Court below, (Record p. 242.) yet much significance is due to the action of that Court upon the validity of Appellant's claims and his ownership of them: inasmuch as this litigation occured within two years after the acquisition of the paper, when everybody's recollection was fresh and vigorous—when everyone was present—Davis, Sprague, Durant, and T. C. Durant, Christopher, Mattox, Bunker and the persons in whose favor the paper was drawn; all the books were there, and a full accounting had. Davis fought these claims then; (Evidence of D. W. Gillett, Record p. 36.) and so did all the partners in the tie contract, and their Creditors. (Evidence of B. F. Bunker, Record p. 85.)

At that hearing, "the issues made on Roger's (Appellant) "claims were, as to the validity of these obligations: the con- "sideration received by the contractors, for which the pap- "er was given, and the question as to whether or not Rogers "had paid them; it being claimed, in several cases by Davis "that the papers alleged to be in Rogers possession, had "not been paid by him." (Evidence of D. W. Gillett, Record p. 36.) And yet under all this close judicial scrutiny, when everything was most favorable for correct and accurate judgment, the issues upon this paper and Appellant's claim in regard thereto were found in favor of Appellant.

We therefore feel justified in claiming, that this branch of the case has been sustained in the most overwhelming and conclusive manner.

III.

THE NEXT QUESTION IS; WAS MR. DURANT THE APPELLEE, A PARTNER IN THE FIRM OF JAMES W. DAVIS AND ASSOCIATES.

In the first place, Mr. Durant makes no attempt to conceal the fact that he was a member of the association which executed the "million tie" contract: or, to be more precise; of the firm which delivered the first million of ties which were delivered by the tie contractors.

It is admitted that there was no formal article of partnership: there is some proof that the firm name agreed upon, was that of "Davis, Sprague & Co." and some proof that no name was agreed on; at all events, the name of "Davis, Sprague & Co." was used to some extent in carrying out the business of the partnership; but the formation of the partnership by its assignments of interests to the various partners, and its subsequent operations indicate with absoluteness and beyond any cavil, that one of the names of the firm which executed the contract, popularly known as the "million tie" contract, as well before the first million of ties were delivered, as afterwards, was "JAMES W. DAVIS AND ASSOCIATES;" and Mr. Durant, the Appellee, being a member of the firm which executed that contract, or which delivered the first million of ties under that contract, was, likewise and necessarily a member of the firm of "JAMES W. DAVIS AND ASSOCIATES;" and the possibility or fact, that the association, also had *another* name does not militate against the force or effect of this conclusion.

The title by which Appellee held his interest in the firm was an assignment of 3-10ths interest in the contract: this document bears date November 20th, 1867, and is signed "JAMES W. DAVIS AND ASSOCIATES."

Two days later another partner was taken in, viz, M. B. Sprague, and his assignment of 1–10th interest is signed, "JAMES W. DAVIS AND ASSOCIATES. [SEAL.]"

Nearly two months later and in the next year, viz, January 8th 1868, James H. Gessner received an assignment of 1–20th interest in said contract, and in said assignment occured this clause " * * James H. Gessner * * is "this day admitted by me as a copartner, to the extent "and limit of 1–20th interest in * * a written contract "so made as aforesaid by James W. Davis, representing "THE FIRM OF JAMES W. DAVIS & ASSOCIATES." This assignment was signed thus, "James W. Davis, Trustee, "JAMES W. DAVIS AND ASSOCIATES."

Several months after this, to wit, on November 20th 1868, another assignment was made of 3–10ths interest in said contract and it was signed thus, "JAMES W. DAVIS AND ASSOCIATES, By James W. Davis, Attorney."

(See Appellee's Exhibit Record pp. 200, 201, 202.)

The evidence of Davis was not taken by Appellee, altho' the possession by Appellee of a private letter to Davis, from a friend of his, attests their close and unhallowed intimacy, during the trial of the suit (see Ex. M. to Wild's evidence, Record p. 129.) but it is clear from the context that the firm name of "JAMES W. DAVIS AND ASSOCIATES" was adopted (not by the circumstance of there being persons associated with him, but) arbitrarily at the start; for when he executed his assignment to Appellee there was in fact no *associates*: so that "JAMES W. DAVIS AND ASSOCIATES" was a *name* for the firm, and not merely *descriptio personæ*.

We thus see clearly, that James W. Davis, the original contractor and partner, before he had associated anyone with him at all to join in the enterprise, named the firm

"JAMES W. DAVIS AND ASSOCIATES;" and that the Appellee herein, acquiesced in that name by taking an assignment of 3–10ths interest signed by that (which he must have considered to not be fictitious, but a legal) name; and that Davis still adhered to that name in the succeeding year; by expressly making a declaration under his hand, while assigning to Gessner, that this association was "THE FIRM OF JAMES W. DAVIS AND ASSOCIATES."

One of the most important matters demanding attention in the execution of so large an enterprise as this, was the proper arrangements regarding a bank account: and upon this most important and vital subject, the proof is clear and uncontroverted, viz; that for the first seven months, there was but one bank account, and that was kept in the name of B. F. Bunker, Cashier; but that from and after June 27th 1868, there were accounts with five several Banks: and they *each and all, without exception or qualification were kept in the name of* "JAMES W. DAVIS AND ASSOCIATES:" and they never at any time or place were kept in the name of *Davis, Sprague & Co.*

That the bank accounts were never kept in the name of Davis, Sprague & Co., but from June 1868, were kept in the sole name of "*James W. Davis and Associates*," even during the time when it was pretended there was no such firm in existence, is attested by the following testimony, and not controverted.

HENRY W. YATES, TESTIFIES: (Record p. 107.) "Am Cashier of the First National Bank, Omaha." * * (Record p. 108.) "I have the books of Kountz Bros. & Co., "for the time they were in business in Cheyenne. * * "James W. Davis and Associates kept a bank account "with Kountz Bros & Co. which account is very long," &c. * * "The only account that I find, is that of James

"W. Davis and Associates. * * The account "was commenced June 22nd, 1868, and was closed * * "May 1st, 1869. * * This ledger does not shew "any account in the name of Davis, Sprague & Co."

Now, let it be recollected that Appellee admits he was a member of the firm which furnished ties up to November 1st, 1868, but denies that there was any firm of "James W. Davis and Associates" in existence then: he asserts that the firm of "James W. Davis and Associates" did not commence its existence till November 1868; while the above evidence shews that the firm had an existence in that most vital part of a firms economies, viz, a bank account from June 22nd, 1868, continously without any settlement or change till the Banking House ceased on May 1st, 1869.

Yet Appellee is compelled to assert as an indispensable element of his defence, not only that this firm did not exist prior to November 1st, 1868, but that the firm was "Davis, Sprague & Co." up to November 1st, 1868, and on that date everything was settled up and the new firm of "James W. Davis and Associates" succeeded.

On the same subject, Charles D. Sherman, Cashier of Kountz Bros., testifies that from the Spring of 1868, until the Spring of 1869, the firm kept their bank account with Kountz Bros. in the name of "J. W. Davis and Associates" and that they never did keep their account with Kountz Bros. in the name of "Davis, Sprague & Co." (Record p. 19.) This witness even says: "P. S. Mattox opened the ac- "count with Kountz Bros. on behalf of Davis & Associates "as I recollect it. * * He did business with our "bank on behalf of Davis and Associates. * * * "The bank account which Mattox opened for James W. "Davis and Associates in the Spring of 1868, continued in

"the same manner as long as I was in the bank." (Spring of 1869.) (Record p. 20.) "I have no recollection of checks "being drawn upon the bank of Kountz Bros & Co. or any "drafts passing through that bank either made or accepted "by Davis, Sprague & Co. or in that name."

APPELLANT TESTIFIES on the same subject: (Record p. 10.) "From 1867 to 1871, * * the "name of the association was J. W. Davis and Associates." * * "Their operations were carried on from Black "Hills to Ogden. * * Kountz Bros. & Co. and "Rogers & Co. of which latter firm I was a member, did "business for this firm in Wyoming; Rogers & Co. for "about three years. They transacted their business with "Rogers & Co. by the name of J. W. Davis and Asso-"ciates."

JONATHAN E. WILD TESTIFIES: (Record p. 123.) "In '68 & '69, was clerk in the banking house of Rog-"ers & Co. I knew James W. Davis and Associates. * "* I can't remember that James W. Davis and "Associates were known by any other name during those "years. * * Davis and Associates kept a bank-"ing account with Rogers & Co. * * I think "their paper was signed, 'Davis and Associates, by James "W. Davis."

CORNELIUS CHRISTOPHER TESTIFIES that he was Cashier of James W. Davis and Associates, from about the middle of September 1868, till the end of the road, and that "during all the time that I was Cashier, * * "we kept the bank account with Kountz Bros. at Chey-"enne; H. J. Rogers & Co. at Laramie City; Rogers & "Co. at Cheyenne; Wilson & Morton at Bryan and also at "Echo City; and ALL KEPT IN THE NAME OF JAMES W. "DAVIS AND ASSOCIATES."

If there be any evidence inharmonious with the above, it is as follows:

From B. F. Bunker, a witness for Appellee, who testifies (Record p. 80.) "I was employed by Davis, Sprague & Co. "as Cashier, from about the beginning of their work until "near the completion of their contract, by the delivery of "the million ties. I received moneys for them, drew checks, "made deposits and attended to their books and accounts. "P. S. Mattox succeeded me as Cashier, in July 1868." * * "Bank checks were drawn in the name of Davis, Sprague & "Co. through their authorized Cashier, B. F. Bunker, on "Kountz Bros. & Co. Cheyenne." (Record p. 86.) "When "I took charge of the cash, &c., for Davis, Sprague & Co. at "the commencement of the million tie contract, I opened an "account for them with Kountz Bros. & Co. at Cheyenne in "my own name, as 'B. F. Bunker, Cashier.' That account "was so kept, and checks drawn on it, to my knowledge, "until Mr. Mattox succeeded me as before stated."

P. S. Mattox, a witness for Appellee, testifies: (Record pp. 55, 56.) "I was Cashier for Davis, Sprague & Co. * * "I succeeded B. F. Bunker as Cashier for Davis, Sprague "& Co." (Record p. 57.) "I *don't think* that the bank ac- "count with Kountz Bros. & Co. and H. J. Rogers & Co. "was kept in the name of James W. Davis & Associates, "from the begining."

H. W. YATES, TESTIFIES: (Record p. 110.)

> "Witness is requested by (Durant's) Counsel to turn to p. 68. of the Ledger produced by him and "state for whom the account there shewn in the "name of 'Benjamin F. Bunker, Cashier,' was kept."

"*Witness:* I judge from this that it is the same account "with Davis & Associates, as the account of James W.

"Davis and Associates commenced at the date when that "account closed."

Q. "What is the date of the last Credit item on this "Bunker account?"

A. "June 25, 1868."

It is thus *demonstrated* (and any contradiction is challenged) that up to June 25, 1868, the bank account of this firm which was delivering the first million of ties under the "million tie" contract, and of which the Appellee was, confessedly, a partner, was kept in the name of "B. F. Bunker, Cashier," on the books of the bank: and it may be that the checks were drawn in the name of "Davis, Sprague & Co. By B. F. Bunker, Cashier;" but that *from and after June 22d* 1868, *until the end of the road was reached, all the bank accounts in all the various banks, were kept in the same identical name as that which is signed to the paper in suit, viz;* "*James W. Davis and Associates;*" and it thus follows that this firm of which Appellee admits himself to have been a member up to November 1868, was known and called, by the voluntary action af its members "JAMES W. DAVIS AND ASSOCIATES," from at least June 1868, through the entire delivery of ties and lumber.

The Court below (p. 239.) found, that although the bank account was in the name of J. W. Davis and Associates, yet the checks "against that account" were "*all*" drawn in the name of Bunker, Cashier of Davis, Sprague & Co.

This rank error of the Court, as well as other errors in its findings of facts, led logically to an erroneous and entirely unsupported decision.

In like manner the books of account of the firm, were all kept from the very first and during the time the Appellee admits himself to be a partner in the business, in the name of James W. Davis and Associates.

The evidence is as follows, viz:

CORNELIUS CHRISTOPHER TESTIFIES; (Record p. 49.) "The books kept by this association consisted "of memorandum, time reports, day books, journals, cash "books, ledger and some time checks, and there was a re-"ceipt book." * * "I kept these books myself: they "were all kept in the name of JAMES W. DAVIS AND ASSO-"CIATES."

APPELLANT TESTIFIES: (Record p. 11.) "I first "saw the books in which the accounts of this firm were kept "in 1868, and afterwards in New York in 1870 or 1871. "* * they were kept in the name of JAMES W. DAVIS "AND ASSOCIATES."

S. B. REED TESTIFIES; (Record p. 140.) "I had "general charge of all the contractors' business for building "the road, including the furnishing of supplies; the ac-"counts were kept with this association generally in the "name of DAVIS AND ASSOCIATES."

On the other hand, Mattox testifies (Record p. 57.) that the books were kept in the name of Davis, Sprague & Co. up to November 1st 1868.

And MARK T. SEYMOUR TESTIFIED (Record p. 47.) "I have seen the books of account of the tie contract-"ors a great many times. The first that I saw were kept in "the name of Davis, Sprague & Co."

But Christopher who actually *kept* the books and made the entries, certainly was more reliable; and his evidence is supported by the Appellant, who was deeply interested, as their banker, to know: and Reed, who represented the parties for whose business this firm existed at all, also knew.

And Christopher's evidence is sustained inferentially by the method of testifying, of B. F. Bunker, a partizan

and zealous witness of Appellee, who is the custodian of the books, and who might exhibit their contents if he chose, as freely as he exhibited other documents favorable to Appellee. (Record pp. 82 to 95.)

Please listen to Bunker, the custodian of the books. (Record p. 45.) "Some of the books are in the hands of the re- "ceiver, and are situated in *those two trunks here present of* "*which I have the key.*"

"MR. WHITNEY. Please produce the books before the "examiner."

"WITNESS. I can't do it, Mr. Whitney; I have been "waiting to see Mr. Nathan, the receiver's attorney: I have "been twice to see him without being able to catch him. I "am waiting for his authority before doing it. I under- "stand these books are still in the hands of the receiver," &c. (Record p. 81.) "I acted as clerk for Redfield (the Ref- "eree) and took testimony for him, * * and had charge "of papers, &c. * * I was also clerk for Mr. Bixby, the "receiver in that cause." (Record p. 93.) "I opened the "ledger in the name of Davis, Sprague & Co. and had that "name printed on the back of it, thus, 'D. S. & Co.' I kept "their books, received and disbursed moneys and receipts "for them." * * (Record p. 95.) "The books in which "the accounts of these million tie contractors was kept, "WERE THE BOOKS OF DAVIS, SPRAGUE & CO. The names "of other persons who dealt with that firm appeared on "those books, AND I DO NOT REMEMBER ANY CHARGES OR "CREDITS IN THOSE BOOKS, TO DAVIS, SPRAGUE & CO. "THEIR NAMES ONLY APPEARED, IF AT ALL, AS OWN- "ERS OF THE BOOKS. I remember, on the back of the "ledger was printed, 'Davis, Sprague & Co.' or 'D. S. & Co.'

As was intimated before, the witness is the custodian of all the books and papers of a long since terminated litiga-

tion in New York; and he is not at all unwilling to put in proof everything that can be of service to the Appellee and harmful to Appellant, as can be seen in the Record in this case from pp. 82 to 95, but while not offering any exhibit of the books, he yet is compelled to testify that he OPENED the books in name of Davis, Sprague & Co. by putting their name on the back of the books as owners: but that said name no where else appears EXCEPT AS OWNERS OF THE BOOKS. And Christopher even states that "there "were some time checks * * headed Davis, Sprague & "Co. but they were soon done away with." (Record p. 49.)

So that we have the evidence of Christopher, Appellant and Reed, that the books were kept in the name of "James W. Davis and Associates." and that of Bunker that they were not *kept* (but only *opened*,) in the name of Davis, Sprague & Co. as against the unsupported evidence of Mattox and Seymour to the contrary.

Again, as we have shewn, it was in the power of the Appellee, through his more than willing witness, Bunker, to have shown these books: and not having done so, it is almost as damaging to his cause as if they had been shewn and had sustained Appellant's theory according to the opinion. In Clifton vs. U. S. 4 Howard 244, where the Court held, "that to with-hold testimony which was in the power "of a party to produce in order to rebut a charge against "him, where it was not supplied by equivalent testimony, "might be as fatal as positive testimony in support or con- "firmation of the charge: that is, if the claimant had with- "held proof which his accounts and transactions with these "parties afforded, it might be presumed that if produced "they would have operated unfavorably to his case: that "the government had shewn probable cause and that the "next inquiry was, whether the claimant had relieved him- "self from the burden of the proof," &c.

In this case, we make out a prima facie case by our own witnesses Appellant, Reed and Christopher, and by the Appellee's witness, Bunker.

That there was *no change at all* made in the bank accounts, or books of account or method of doing business from the beginning of the performance of the million tie contract till the end of the road was reached, is clear.

The evidence is as follows:

C. D. SHERMAN, (Cashier for Kountz Bros. & Co.) testified: "Mattox never notified me at any time during "the year 1868 or 1869, that Davis and Gessner had as- "sumed the contract of the company for furnishing ties * "The bank account which Mattox opened for James W. "Davis & Associates, in the Spring of 1868, continued in "the same manner as long as I was in the bank. I don't "recollect any settlement being made, and a new account "begun with other parties under the same name, in the Fall "of 1868." (Record p. 19.)

S B. REED, (Supt. of construction for the R. R.) testifies: "I don't reccollect ever receiving any official notice of "the change in the firm of Davis and Associates at any "time."

APPELLANT TESTIFIES: (Record p. 11.) "no "change of name was ever made known or manifested to the "public from the beginning to the end of their operations: "Mattox never notified me that a change had been made, "at any time, nor Christopher, nor any one else. * * "There was no difference whatever in the name appended "to their commercial paper, from my first transactions with "them throughout the whole, except that in the Fall of

"1867, there was put in my hands for collection, some notes "* * * signed Davis, Sprague & Co. * * Mattox "paid me by checks on Kountz Bros. & Co. and signed the "checks "James W. Davis and Associates" &c.

CORNELIUS CHRISTOPHER, (book-keeper and cashier) testifies: (Record p. 50.) "I don't remember the "time at which about a million ties had been delivered to "the road. There was no change made in the membership "of this association during the delivery of ties by it, nor was "any settlement made with the railway company for ties "theretofore delivered, and a new account opened. I made "all the settlements as far back as the middle of August "1868. * * * The association furnished near-"ly two million ties. * * I was in the employ of "this association, and continuously on duty in the month of "November 1868, and no general settlement was made with "the creditors during that month, only regular pay-day, "which was about the 15th."

WILLIAM W. CORLETT, (the firm's attorney) testified: (Record p. 122.) "I don't know of any change in the "firm name or business carried on at Fort Saunders, in the "Fall of 1868, from what it had been carried on in, prior "to that time."

D. W. GILLETT, (counsel for Davis and Gessner in the New York suit) testifies: (Record p. 40.) "I frequently "saw the account books of the tie contractors. I don't "recollect by what name the accounts in these books were "kept."

Q. "Was there any break in the continuity of these ac-"counts, from the beginning to the end of them?"

A. "We claimed there was none. There don't appear to "be any closing up of the books at any time during the

"furnishing of ties, and the commencement of accounts in a "new name. I don't remember what period of time these "books covered, but it purported to cover the entire period "during which ties were being furnished by the contractors. "I don't remember that the accounts contained in those "books were kept in the same name from beginning to end."

Notwithstanding this overwhelming exhibit of evidence in support of Appellant's theory, there are even stronger circumstances, which have been incidentally suggested, but which it may enlighten the Court by being grouped together. These are practical admissions, by the managing partners of the firm that there was but one firm and that the two names represented but one firm.

W. W. CORLETT, (the attorney for the firm) testifies: (Record p. 113.) "I made a draft on James W. Davis and "Associates at Cheyenne, in favor of Rogers & Co. for $250. "on or about December 5th 1869." (Record p. 114.) "This "draft was drawn on account for indebtedness for legal ser- "vices rendered to Davis and Associates and Davis, "Sprague & Co." It has been proved by Rogers that it was accepted by James W. Davis and Associates. (Record p. 10. p. 3.)

A. W. HAYGOOD testified that (Record pp. 116. 117.) in July 1868, he made a contract with *Davis, Sprague & Co.* which was violated, and that afterward, Davis paid him $500. damages in the *paper of Davis & Associates.*

ISAAC W. FRENCH testifies (Record p. 122.) that in September 1868, he received a check for lumber which had been previously sold to *Davis, Sprague & Co.* and that this check was drawn on Kountz Bros. & Co. *in a different name:* and it has been sufficiently shown elsewhere, that the bank account with Kountz Bros. & Co. was in Septem-

ber 1868, in name of James W. Davis and Associates. (Record p. 107.)

The Appellant himself testifies (Record p. 12.) that in the Fall of 1867, there was put in his hands for collection, some notes signed by "Davis, Sprague & Co." and that they were paid by checks of "James W. Davis and Associates.

It is an uncontroverted fact that in the winter of 1869, at the extreme western part of the work, Sprague was in full charge; (Ev. of Van Tassel p. 157.) and it is nowhere pretended that Sprague was an employee of Davis and Gessner. How now, is this *fact* possible, if Sprague ceased to have any connection with the business in November 1868, at Elk Mountain: a point far east of Bear River?

This *fact* is entirely harmonious with Appellant's theory of the case, but entirely at variance with that of the Appellee.

Again: Mattox testifies that the affairs of Davis Sprague & Co. were closed up on November 1st 1868, (Record p. 56.) and yet we find him accepting an assignment of 1–10th interest in the "million tie" contract, twenty days later; and he pretends that no one had anything to do with the contract that was being performed then, save and except Davis and Gessner. (Record p. 202.)

R. S. VAN TASSEL thus testifies: (Record p. 156.) "In 1869, I was on the Big Laramie River in the employ of "*Davis, Sprague & Co.*"

(But it will not be forgotten, that upon Appellee's theory that firm ceased to exist on November 1st, 1868.) (Record p. 56.)

Again, the same witness testifies, (Record p. 156.) that "goods were consigned to Sprague, Davis & Co. as far "west as the Little Laramie; and from there to Promon- "tory Point, to 'Davis, Sprague & Co.' and 'Davis and "Associates.'"

(Promontory Point is the last point but three on the entire line.) Of this, the Court will take judicial notice.

Again, the same witness testifies, (Record p. 157.) * * "in the winter of 1869, I drew my salary from Davis, "Sprague & Co." (But Appellee's theory is, that this firm ceased to exist after November 1868.)

That the firm which delivered the first million ties, and the firm which continued to deliver ties and lumber till the road was completed, were one and the same, and known indifferently by the varied names of Davis, Sprague & Co., James W. Davis and Associates, and Davis and Associates, is further attested by the following evidence, viz;

JESSE H. LACEY TESTIFIED: (Record p. 153.) "I "had business with the firm of Davis, Sprague & Co. dur- "ing 1867, 1868 and 1869, but I don't reccollect as to James "W. Davis and Associates, whether I did or not."

And Lacey was a witness for Appellee: and it seems from his evidence, that the firm was known as Davis, Sprague & Co. even in 1869.

S. B. REED, the Chief Engineer of construction of the Union Pacific Railway, testifies that he "was in the employ "of the U. P. R. R Co. from 1864, '5, '6, '7, '8 and '9, as "general superintendent and chief engineer of construction "for building the road from a point twenty miles west of "Omaha, to the western termination." * * and that, "the same gentlemen that commenced delivering ties "and timber and lumber on that contract, continued

"through to the end: that is, I mean till the road reached "the Central Pacific." (Record p. 139.) He further testifies that, "all bills for material furnished along the line of "road, was paid from my office: that is, from my Cashier's "office, the vouchers being made out and approved by me. " * * The vouchers from these persons furnish- "ing ties, were generally made in the name of Davis and "Associates." (Record p. 139.)

Upon cross examination, the same witness was asked,

Q. "You stated that the same men who commenced the "million tie contract continued through to the end," &c. "How do you know that, when you can't tell who were in- "terested?"

A. "Well, the accounts were kept in the same name. "That was the only way I knew, and Davis and the same "parties substantially were in charge of the work."

Bunker states that, "Fort Saunders was the place of "business of Davis Sprague & Co." (Record p. 81.) And Seymour states that Davis, Sprague & Co. had their head quarters at Fort Saunders. (Record p. 47.) But Corlett their lawyer, states that the firm doing business at Fort Saunders was impleaded "sometimes as Davis, Sprague & Co." and sometimes as "Davis and Associates." (Record p. 111.) And it nowhere appears from the evidence of any of the four different lawyers who appeared for or against them (Corlett, Steele, Woolworth or Street) that they ever plead a misnomer either in abatement or in bar. And Corlett testifies that "Davis, Sprague & Co." and "James W. Davis and Associates" were sometimes joined as copartners." (Record p. 112.)

CORLETT further testified: (Record p. 110.) "The "firms whose business Sprague represented were known as "Davis, Sprague & Co. or Davis and Associates (Record p.

"111.) I have as an attorney, examined papers in suits com-"menced in Wyoming, in which Davis, Sprague & Co. or "James W. Davis and Associates were parties." "How "was this firm doding business at Fort Saunders, implead-"ed?" "Sometimes as Davis, Sprague & Co. and some-times as Davis and Associates. * * The firm of "Davis, Sprague & Co. or James W. Davis and Associates "was almost universally known along the line of the road. "(Record p. 112.) This firm dealt with the public, by the "names of Davis, Sprague & Co. and Davis and Asso-"ciates."

F. A. KENT TESTIFIED; (Record p. 14.) "I knew "an association of persons furnishing ties, called Davis, "Sprague & Co. or Davis and Associates."

A. W. HAYGOOD TESTIFIED: (Record p. 116.) "I "have heard two names applied to this firm or association; "Davis, Sprague & Co. and Davis and Associates. The "personal knowledge I have, was in reference to a contract "I took of Sprague. * * Closed a contract with "him for hauling ties for Davis, Sprague & Co. as I under-"stood it. This was in the month of July 1868. They "could not furnish the ties for hauling, and I claimed $500. "of Sprague for damages, and afterwards, Davis included "this amount in a settlement, *giving me paper of Davis and "Associates.*" (Record p. 117.)

LUKE MURRIN TESTIFIED: (Record p. 118.) "The "firm name was Davis, Sprague & Co. and Davis and Asso-"ciates."

AMASA R. CONVERSE TESTIFIES: (Record p. 119.) "The names, Davis, Sprague & Co. and James W. "Davis and Associates, were in use at the same time."

ISAAC W. FRENCH TESTIFIED: (Record p. 122.) "The company at Fort Saunders known as Davis, Sprague

"Co. had another name, which was Davis and Associates "I always knew them as one and the same concern. * * "Davis and Associates seemed to be the commercial name "that was given to the public, and Davis, Sprague & Co. "were regarded among their employees and other persons "doing business with them. I sold lumber to the name of "Davis, Sprague & Co. and when I received the check on "Kountz Bros. & Co. at Cheyenne, it was signed by anoth-"er name." He also testifies this was in September 1868, and by the concurrent testimony of Yates (p. 108.) and Christopher (p. 48.) the bank account with Kountz was in name of James W. Davis and Associates. And in point of fact, his receipt, for which a check signed by James W. Davis and Associates, was given in payment, is introduced in evidence by Appellee and reads as follows:

September 25th, 1868.

Received of Davis Sprague & Co. for building the Union Pacific Rail Road, three thousand ninety one 20–100 dollars to close account of lumber.

I. W. FRENCH.

So this transaction shows conclusively that in September 1868, the firm was doing business indifferently under either name: i. e. taking receipts in one name and drawing checks therefor in the other name.

DANIEL McLAUGHLIN TESTIFIED: "I knew "some firm or association doing business at Fort Saunders "as early as May or June 1868, commonly called Davis, "Sprague & Co. and James W. Davis and Associates. "(Record p. 130.) I was aware that both the names Davis, "Sprague & Co. and James W. Davis and Associates, were "used in commercial transactions."

NICHOLAS J. O'BRIEN TESTIFIES: (Record p. 133.) "I first heard of James W. Davis and Associates, in

"'67 and '68, when the road was being built, and Davis, "Sprague & Co. about the same time."

WILLIAM R. STEELE TESTIFIES: (Record p. 154.) "Am an attorney at law. I know an organization en- "gaged in the business of furnishing ties and lumber for "the U. P. R. R. My first knowledge of them, dates from "May or June 1869. The firm name was Davis, Sprague & "Co. or James W. Davis and Associates. * * I knew of "lawsuits being prosecuted in 1868 and 1869, against Davis "Sprague & Co. and Davis and Associates. There were, "during that time, suits commenced by Lowry & Upton, "against Davis, Sprague & Co.: I. W. Collins, against "Davis, Sprague & Co.: Laycock against Davis and Asso- "ciates: Wanless & Co. vs. Davis and Associates; Steele "& Co. vs. Davis, Sprague & Co.: Ivanson vs. Davis and "Associates; Cook vs. Davis, Sprague & Co.: I. W. Col- "lins vs. Davis and Associates The association engaged in "the business of furnishing ties to the U. P. R. R. was "known and dealt with as Davis and Associates and Da- "vis, Sprague & Co. indifferently by both names." (Record "p. 155.) "I was one of the attorneys for Davis, Sprague "& Co. and Davis and Associates, in all the suits men- "tioned in my direct examination."

CHARLES D. SHERMAN TESTIFIES: (Record p. 20.) "I never knew of the firm of James W. Davis and "Associates going by the name of Davis, Sprague & Co. "I had heard of Davis, Sprague & Co. but had a general "impression that they were one and the same thing. Da- "vis, Sprague & Co. was a sort of side issue."

APPELLANT TESTIFIES: (Record p. 11.) "When I "first knew this association in Wyoming, it was known to "the public generally as James W. Davis and Associates."

L. C. STEVENS TESTIFIES: (Record p. 133.) "I "was acquainted as far west as Wasatch, Utah Territory, in "1868, with the business men along the road. I knew a "firm of Davis and Associates or Davis, Sprague & Co."

He also says, (Record p. 134.) he heard the name of James W. Davis and Associates in the winter of 1867 and '68, and, "I understood Mattox to be the Superintendent of "Davis and Associates in getting out lumber at Bear "River. He seemed to be the person in authority there, "and I was referred to him."

This fully corroborates Van Tassel and shows clearly that Sprague was a member of the firm in its last operations, for Bear Creek is very near the end of the whole line.

T. A. KENT TESTIFIED: (Record p. 115.) "I first "heard of James W. Davis and Associates * * at "Benton, where Wilson & Morton had one corner of my "tent for a bank, and Sprague had a tent opposite: and "they (James W. Davis and Associates) deposited money "in the bank and told Morton to take up their paper, but "only at a discount. Some men presented some paper "which Morton offered to discount, but they went, having "pistols and knives, and made Sprague take it up. There "was something said about Davis, Sprague & Co. and "Davis and Associates; but the man said he didn't care "a ——— but the paper had to be taken up." * * "Sprague claimed that the money in bank was for one firm "and the work had been done for another."

We thus see one reason why the firm had an *alias*.

JAMES . W. DAVIS, the managing partner, thus testifies in the exhibit put in evidence by the Appellee: (Record p. 182.) "No firm name of the said parties was ever "agreed upon, or adopted by them, but they at first as-

"sumed the style of Davis, Sprague & Co. and in their deal-"ings with all parties save the said defendant's trustees, " * * they for a long time used that style: but "the said trustees, from the first, kept their accounts with "this defendant, Davis and his copartners, in the name of "James W. Davis and Associates, and afterwards, the en-"tire business of said firm was transacted under that style. "But the two names of Davis, Sprague & Co. and James "W. Davis and Associates, described and designated one "firm and one set of parties only, and from the making of "said contract down to the present time (Oct. 11, 1870.) "but one firm has ever existed, engaged in executing said "contract."

It certainly must be unnecessary to adduce more in support of the proposition that the same firm was identical throughout the whole period of furnishing ties from 1867, to 1869, and that it was known indifferently by the names "Davis, Sprague & Co." and "James W. Davis and Associates."

At this point, it may be well to note and refute some prominent (but probably unintentional) misstatements of Appellee, in a Brief filed by him in the Court below and which may properly be anticipated here. Said Brief avers (on p. 5.) "it was understood in the beginning to what "points on the road * * the contract would "really extend. This point on the road was Elk Moun-"tain. We ask the especial attention of the Court to this "point as one of great importance in the understanding of "the case."

If this be so, Appellee should be sedulous to not mislead the Court on that matter of great importance.

The Brief cites seven witnesses to sustain their statement of an absolute fact, viz; that "IT WAS UNDERSTOOD "IN THE BEGINNING" &c.

Let us array the evidence thus proffered.

The first witness, Bunker, says: (Record p. 46.) "The "concern * * had a contract for a million ties. "Their operations *extended* to a point called Elk Moun- "tain, where the million ties were delivered." Again, (Rec- "ord p. 80.) "The * * contractors furnished "their ties east of Elk Mountain. * The business ex- "tended to a point on the road called Elk Mountain. "The ties they furnished, tied the road * * to "Elk Mountain. Their contract was for a specific number "of ties, and Elk Mountain was the point on the road "where that number reached." (Record p. 96.) "I do not "swear that the million tie contract by its terms extended "to any place, but that the million tie contractors, in com- "plying with their contract, furnished ties from where they "started, westward to Elk Mountain."

The second witness, Mattox, says: (Record p. 55.) "Some of the ties * * went to Elk Mountain "but they were all got out east of that locality."

The third witness, the Appellee, says: (Record pp. 60, 61.) "The ties delivered * * were used from the "Black Hills westward. * * Elk Mountain was "the terminous. * * I know this from informa- "tion and from the records, but have no personal knowl- "as to it."

The fourth witness, Ruth, says; (Record p. 75.) "The "work * * was done under this contract east "of Elk Mountain."

The fifth witness, Kountz, says: (Record p. 74.) "James "W. Davis and Associates I UNDERSTOOD, were engaged " * * west of Elk Mountain."

The sixth witness, Seymour, says: (Record p. 47.) "I "was superintendent * * west of Elk Moun- "tain."

The seventh witness, T. C. Durant, says: (Record p. 65.) "I know all about the million tie contract. * * "*There was no point on the road named in the contract, to* "*which it was extended. It was for a number of ties to be* "*delivered at certain points, according to the contract, and* "*they were delivered as agreed.*"

It will thus be seen that this POINT of such great importance to Appellee, is shown by the evidence to be no point at all.

Another prominent misstatement occurs on p. 4. of Appellee's Brief in the lower Court, to this purport: "The "assignment to Crane, Richards and Mattox purports to "bear date November 20, 1867." Reference is made to the Record pp. 32, 202, 218, 222, 226, to show that this assignment was made one year later.

Another most glaring misstatement occurs at the bottom of p. 4. and top of p. 5. as follows: "Davis, Sprague "& Co., these contractors for the million ties, kept their "bank account with Kountz Bros. ONLY, and it was kept "in the name of B. F. Bunker, Cashier."

As the Court below adopted this statement as being absolutely true, evidently without ~~looking~~ recollecting at the Record, attention is invited to the mass of uncontradicted proof to the exact contrary, as follows, viz :

Rogers, p. 10.

Sherman, p. 19.
Christopher, p. 49.
Yates, p. 108.
Wild, p. 103.

Appellee's only escape is upon a technicality of language: but the essential idea conveyed, is, that the firm which delevered the first million ties, had no bank account except in the name of "B. F. Bunker, Cashier:" while the intraversable fact is, that this firm did *in the name of James W. Davis and Associates* have one or more bank accounts, from and after June 22nd, 1868, for nearly five months of their delivery of the first million of ties.

The Appellee encumbers the record with a vast quantity of receipts of the firm, by its name of "Davis, Sprague & Co." made before November 1868, and another lot made by the firm, by its other name of "James W. Davis and Associates," after November 1868.

Cui bono?

If these were *all* the documents, it might show something; but the fact is, they are only such as the Major Domo, Bunker, chooses to show. The exhibition of these receipts, therefore, shows nothing, except that the name Davis, Sprague & Co. was used before November, 1868, and the name of James W. Davis and Associates was used after that date. This we admit: but we have clearly proved that the name of James W. Davis and Associates was also used before November, 1868, and the name of Davis, Sprague & Co. was likewise used after that date; and hence it only shows, that the two names were convertible for the same concern.

By reference to the million tie contract (so called) itself, (Record p. 198.) it will appear that, in addition to the

furnishing of ties, there were the following other matters embraced in the contract, viz:

1. Purchase of the Company's outfit at Saunders.
2. Purchase of Saw-mill for $3.500.
3. To furnish all lumber it would cut for twelve months and deliver the same at $45. per M.
4. To furnish 300 M. feet of lumber at $40. per M. and 300 M. feet at $45. per M. at Dale Creek Bridge.
5. To furnish hewn, timber, indefinitely at convenient points west of Saunders at $40. per M.

A desire being expressed by the Appellant at the trial below, to know how the property was disposed of when the firm was dissolved on November 1st, 1868, was gratified by these asseverations of Mattox, the only witness who was cognizant of the settlement. He says (Record p. 58.) "Davis drew out the balance due Davis, Sprague "& Co. on the completion of the million tie contract, and "invested it in Davis and Associates and swamped. * * "Davis, Sprague & Co. sold what surplus ties they had on "hand at the completion of the contract to Davis and "Associates; this was after November 1st, and until the "surplus ties were absorbed. Davis made the sale. * * "Davis drew out the surplus fund of Davis, Sprague & Co. "and used it in the work west of Elk Mountain."

But it is a remarkable and unaccountable fact, that it did not occur to Davis the vender, nor yet to Davis the vendee, nor to Mattox the historian of the unique transaction, to dispose of the "outfit" and the "saw-mill" and the several timber contracts and the surplus timber.

As Davis "swamped" the money, and appropriated the ties without remonstrance from their owners, it ought not to have been beyond the limits of his enterprise and his

former partners' apathy, to have purloined the saw-mills, outfit and lumber piles as well.

That it was the intention of the tie contractors, by whatever name known, to furnish all the ties and lumber that might be required along the entire line: and that they took measures to carry into effect this intention, is established, by their sending Bunker to the extreme west end of the line as early as July, to make contracts for ties on that part of the work. Despite Bunker's testimony to the contrary, it is very manifest that these ties were contracted for by the same concern that were already delivering ties at the east end of the line. At that time, July 1868, the first million of ties had not been nearly all delivered, in fact were not delivered till November, thereafter. It is not pretended that Davis, individually, or Davis and Gessner, jointly, had any contract for ties at this time. In fact, it is not pretended that any one had any contract for ties, save and except the firm of James W. Davis and Associates, or Davis, Sprague & Co.

Appellee testifies that *late in the summer* of 1868, at Chicago, Davis told him that "he was satisfied there was "going to be a good many more ties needed to build the "road than what were contracted for, and he was going to "try to get a new contract for the balance." (Record p. 59.)

T. C. Durant states that (Record p. 66.) "*when the mil-*"*lion tie contract was nearly completed*, Davis came to me "and wanted a new contract." And the million ties were not all delivered till November 1868.

Therefore he could not, early in July, have had any contract outside of the "million tie" contract: hence he could not have been getting out ties in July, except for this contract: the Union Pacific Railway was the only customer for ties there: so long as Davis had the co-operation of

T. C. Durant's brother, and other persons having great influence with T. C. Durant, allied with him, and the backing of their capital, he might safely proceed and get out ties in excess of a million, with an assurance that being on hand, and procured with the capital of this combination, T. C. Durant could be easily induced to conclude a contract for them: but it would be a gross improbability to suppose that Davis, or even Davis and Gessner would, on their own hook, and *without a contract*, get out a lot of ties in the wilderness, and thus place themselves at the mercy of the U. P. Ry. in the matter of price, or even of said road taking them at any price.

From which it follows:

1st. That as early as July, 1868, operations were commenced by the tie contractors, for supplying ties along the whole line from Elk Mountain westward to Salt Lake. (As to the firm name under which it was done, it don't matter.)

2. That as the only concern then in being for furnishing ties, was the original concern, (by whatever name known) that was the concern for which the contracts made by Bunker along the whole line, were made.

3. That it is thus rendered plain why there was no break in the continuity of the bank accounts: (as testified to by Yates, Rogers, Sherman, Wild and Christopher.) and no break in the continuity of the books of account; (as testified to by Reed, Gillett, Christopher and Rogers.) and no change whatever in their mode of doing business: (as testified to by Reed, Christopher, Sherman, Rogers, Corlett Kent, Haygood, Murrin, Converse, Street, French, Wild, McLaughlin, Glover, O'Brien, Stevens, Steele and Van Tassel.)

4. And by clear inference, it cannot be otherwise than that when the contract for a million ties was made, there was a tacit understanding that this concern would furnish the whole line; and that the work proceeded without a lapse till the whole line was finished.

The turning point in this branch of the case is, whether Sprague, Richards, Ruth, Mattox, Durant and Crane withdrew from, and left Davis and Gessner to continue the business alone, after the first million ties were delivered.

That they did not so, is shown by the conclusive fact that the managing partners kept on with the business just as before, for a year after the alleged dissolution, with no change or settlement.

That they did *not* do so, is also shown by the equally significant fact, that Sprague, one of the alleged retiring partners, kept on in the firm, and in the management of the business as before, precisely, till the end of the road was reached.

That no one retired, or withdrew, is attested by the fact that no single one of the six alleged retiring partners, ever gave any notice that he had retired, or even demanded a settlement, until the end of the road was reached.

That no dissolution was made, is likewise proved by the fact that the business was kept right along for a year after the alleged dissolution, with the immense capital which had been contributed and had accumulated (the former being $100.000, [Record p. 69.] and the latter $225.000.) (Record p. 227.) in use in the new business, without one word of dissent or remonstrance from the alleged retiring partners, or any claim for interest, at any time.

This conclusion is also established, by the equally significant fact, that for a year after the alleged dissolution,

the sawmills, camps, logging apparatus, cattle and all other outfits, were used and destroyed by the new regime, without any objection on the part of the alleged withdrawing partners.

Thos. C. Durant and Sidney Dillon, who employed this firm in the first place, swear that Davis, for himself and his partners or associates, made a new contract for the delivery of more ties when the first contract was completed.

And Davis, on several occasions, swears to the same thing,

And none of the partners repudiated the new contract or objected to its being performed with their capital, and their outfits and saw-mills.

And one of them, Sprague, kept on in the management of the new contract in the same way that he had managed the original contract.

And no notice whatever, specific or general, was given to the engineer in charge of the construction of the Railway, of a change; and no notice whatever was given to the public with whom this association were dealing, of any change.

By every act of his life down to September 20th, 1870, Appellee considered himself (so far as appearances were concerned), to be a partner; he was on the ground in the Spring of 1868, and acquiesced in all that was going on: and he was not only on the ground in January, 1869, but also all along the line, and although not at the theatre of operations after that, he was within forty-eight hours ride thereof: and he seems to have been so well contented with matters, as to have continually acquiesced, till the whole road was completed.

His capital was there: $30.000. according to T. C. Durant, (Record p. 69.) and he left it there to earn money for him. His name was there, attracting credit, and guaranteeing payment; and he left it stand: though he could easily have given notice. His share of earned profits was there, $22.000. and he left it remain to earn more. His 3–10ths interest in the saw-mill, and cattle trains, and logging apparatus, and camp equipage was there; and he let it all remain, to wear out and be consumed, in order to produce more, as must be supposed.

The evidence therefore, is distinct and uncontradicted, that every act of his proclaimed, that he considered himself, as a partner of James W. Davis and Associates.

It is possible that *before* the million tie contract was ended, he told Davis that he wanted no more of it; but IT IS NOT TRUE, or pretended, THAT WHEN THE MILLION TIE CONTRACT WAS ENDED, THAT HE DID, IN FACT, WITHDRAW; or that, at any time afterwards, he did withdraw, or even make any attempt thereto.

Davis and Sprague had frequent quarrels; in which the former expressed his determination to drop the latter; and it probably would have been done, had it not been for the interference of T. C. Durant: these quarrels lasted till the Winter of 1869, as Van Tassel swears; but still, even Sprague hung on till the last.

Appellee could have proven the whole thing by Davis: he was on the most cordial and intimate terms with him: as his betrayal of friendship by bargaining Christopher's friendly letter to him, shows; but he could not have shown even by him, that Appellee was not a partner of James W. Davis and Associates; he had sworn to the contrary, too often as is shown by the record.

When the million ties had been delivered, the contracts for lumber remained still in force; and Davis for himself and associates, extended the contract for ties likewise; and as W. F. Durant was *en rapport*, doubtless, with his brother, who could inform him, and doubtless did, of just what Davis had done; he should then have dissented, if he was dissatisfied.

Let it be borne in mind, that this firm could not absolutely cease business when just one million ties were delivered; because there were a lot of surplus ties on hand: and when Davis made the new verbal contract with T. C. Durant for more ties, it could only have been for him and his associates, because the ties belonged to them as much as to Davis; and Mattox's story, that Davis, a member of Davis, Sprague & Co. sold these surplus ties to himself, as member of James W. Davis and Associates is too transparent, to deceive anybody.

These surplus ties were sold to the R. R., and the previous tie contracts could not be set aside at will; but had to be met, and so the organization kept right along to the end, *ex necessitate rei*, without any break in the continuity of the business, as is shown by the bank accounts: books of account; receipts to the railroad: belief of their cashier and book-keeper; belief of their lawyers; belief of their bankers: belief of the chief engineer of the railroad: belief of of the trustees of the railroad; belief of the entire community where their operations were being carried on.

Possibly it may be claimed that another, and a distinct and different firm, by the same cognomen, and doing the same business in the same region, but with different members, commenced its career in November, 1868, using the saw-mills, cattle trains, log wagons and outfit of the first named firm, without obtaining leave or license thus to do:

and that the commercial paper in suit is the commercial paper of "James W. Davis and Associates" No. 2.

But even if it should be conceded that there were two firms of the same name, one becoming *functus officio* in November, 1868, and the other arising upon its ruins, it would not follow or be presumed that the commercial paper in suit was the paper of the second concern. Why should it? It appears everywhere from the record that the tie contractors were always behind with their payments. Thus Corlett testifies that, as late as December, 1869, he drew on James W. Davis and Associates, for moneys due in part from the concern by its name of Davis, Sprague & Co., which was accepted by James W. Davis and Associates, (Record pp. 114.) but not yet paid: and Appellee concedes that Davis, Sprague & Co. only existed during the life of James W. Davis and Associates the first.

The witness, Haygood, narrates that in July, 1868, the firm of contractors by its name of Davis, Sprague & Co. became liable to him for $500. damages, and that long afterward, the firm paid him by paper in its firm name of "Davis and Associates." (Record pp. 116, 117.) French testifies that in Sept, '68, he sold some lumber to this firm by its name of Davis, Sprague & Co., and that even when he got a check on Kountz 's bank in another name (which was that of James W. Davis and Associates, as they kept their account only in that name): that he was obliged to wait ten days for payment. (Record p. 122.)

From the evidence of T. C. Durant, (Record p. 67.) we find that he was stopped by creditors of the contractors in default of $106.000. then past due: and that these creditors were so fatally bent on getting their pay, that the directors of the U. P. Ry. then and there paid it to get

released; and finally we find, as late as Nov. 16. 1871, many thousands of dollars remaining due and unpaid. (See Referee's report, Defendant's Ex. Rec. pp. 30, 31.)

So that, even if it should be considered that there were two firms by the same name, one ending its career and the other commencing its career, simultaneously, in November, 1868, it would, nevertheless, be impossible to determine which one of them owed this paper, as it was all given doubtless for past due indebtedness, and we cannot tell accurately how old the several items of indebtedness were; and having proven the paper, and proved by the cashier who made it, (Christopher) that it was the paper of James W. Davis and Associates, the FIRST, our case is made.

Now, was there, in fact, any *second* firm of "James W. Davis and Associates?" Let us see.

When the million ties had been delivered, the firm had a large quantity of other ties being delivered, some in process of manufacture, and sub-contracts extending into the future. They had, likewise, ox-trains, a saw-mill, camps and outfits; the various members of the firm might have stopped all operations then and there: they might have left their surplus ties to rot, or sold them out, and have disposed of their saw-mill, oxen and out-fits as they could, all of which would have been a great sacrifice of their property. Or, they might have kept on, with a better prospect of a successful enterprise, now that the firm was established, than in its inception, when it had to undergo the inevitable and incidental losses accruing from the first establishment of a business.

The latter was the wiser course and the one adopted; and Davis and his Associates "continued to furnish other "like material as in said contract is mentioned, until the "work of building the U. P. Ry., was completed;" and

"that each of the members of said firm, and especially said "plaintiffs Durant and Sprague, assented to the continu- "ance of said business,and the use of its means as afore- "said, and but one firm performed said first contract and "the service afterward rendered, and the members thereof were and are those in the said complaint, mentioned as "members of the firm of Davis, Sprague & Co." (Sworn answer of J. W. Davis, Defts. Ex. A. Rec. p. 182.)

Corroborative of the above, *Thomas C Durant* and Sidney Dillon, severally swear that after the delivery of one million ties, "Davis offered and proposed on behalf *of* "*himself and his partners or associates*, to sell and deliver "to these defendants, as trustees, ties and timber, at cer- "tain prices fixed and agreed upon, to an amount some- "what exceeding $200.000. That these defendants accep- "ted said proposal, and agreed to pay the prices fixed "upon for said ties and lumber upon delivery." (Defts. Ex. A. p. 184.)

The Defendant himself, says: "I was out there in 1869, "in my own interest to find out about how our matters "stood, and to get a statement, if I could, of the million tie "contract." (Durant's Ev. Rec. p. 61.) And although he went as far as Ogden, (ib.) which was near the end of the road, yet he expressed no single word of dissent at the operations which were being carried on with cattle, ox-teams, saw-mills, &c., of which he owned 3–10ths, and which he certainly would not have permitted had he not supposed that he was still a partner, and that the property in which he owned the largest share of any one, was being used for his benefit and profit.

This outfit consisted of a saw-mill for which $3.500 had been paid ; and consisted likewise of wagons, harness and teams, which were purchased of the trustees of the R.

R. at cost; (Deft's Ex. A. Record p. 117.) and which doubtless involved a large capital. The million ties were all furnished by November, 1868, and yet Davis & Sprague were permitted to continue in the use and enjoyment of the saw-mill and outfit, using up and wearing out the same, until the end of the road was reached, and all for the benefit and profit of Davis and Gessner! (so counsel must argue.) Not only so, but if the interest of W. F. Durant and the others ended with the furnishing of a million ties, and they did not continue as partners in the further prosecution of the tie business, they all unitedly, or some one or more of them in particular, would have, at some reasonable time after the ending of the business in which they had invested $10.000. demanded a settlement of the business, and a restoration of their capital, and the profits, if any.

Perhaps counsel can tell how Gessner came to be the '*associates*" of the new firm. The name of the first "James W. Davis and ASSOCIATES" which comprised Durant, 'Richards, et al., was *appropos* and grammatical. But the statement that Davis formed a new partnership, consisting of himself and one other man, and called it by the ungrammatical, illogical, false and polynomial title of "James W. Davis and ASSOCIATES" taxes human credulity to an unwarrantable extent, and baffles belief.

Confessedly, James W. Davis continued in the management of the tie business, from the making of the contract till the completion of the road, in precisely the same way from first to last everywhere, declaring under oath that the contract and partnership was homogeneous and entire from beginning to ending.

The million tie contract is said, by Mattox, to have been completed on November 1st, 1868, but no settlement

was demanded by any of the partners till September 26th, 1870, when the bill in the New York suit was filed.

The entire delivery of ties was completed in 1869, but no denial was made by Durant, that he was a partner in the whole delivery until September 26th, 1870, when it was developed that money had been made in the execution of the million tie contract, and that money had been lost in the delivery of ties beyond the million tie contract: then for the first time he disclaimed any connection with the losing contract.

In view of the fact that all these partners allowed Davis to make a new verbal contract for himself and them with the trustees of the Railway, and to go on with the work and operations of delivering the ties, keeping the accounts continuously in the same name and books, keeping the bank account in the same name and style, receiving monies from the Railway, in the same name and style, giving no notice to the Chief Engineer of the R. R. of any change, and making no resistence or objection to any of these acts till the completion of the entire contract, and an ascertainment of the fact that a loss had occured, it would be most iniquitous to entail the loss on Davis alone, as between him and his partners and associates: in fact, it would be a most unwarrantable and unauthorized interference in the affairs of this partnership for a Court to hold that there was a dissolution thereof on November 1st, 1868, when nearly every act and proceeding of the partners themselves, demonstrated that they had no such intention in view.

It is sad to believe that dishonesty and double dealing should inhere in the prosecution of a colossal enterprise like that of constructing the Union Pacific Railway: but impartial history records that ungrateful fact, as to the

general scope and management: and the evidence in this case, leaves no hope that purer methods were observed in the enforcement of the details of the scheme.

What were the tie contracts? Were they legitimate business enterprises? Or were they devices by which the patient *United States* which was the capitalist of the enterprise, could be burdened with a pack of hungry tide-waiters?

Can it, for one moment be seriously supposed that the prices accorded for the first million of ties, were so done in accordance with pure business principles? In that enlightened age of the world, can it be supposed that a profit of $223.000. could accrue from the furnishing of 1.000.000 of railway ties, had proper business methods been pursued? Why was not competion invited through the press of the large cities, if it was desired to secure a faithful and provident contract?

Yet what do we behold? An immense contract awarded to a man with no capital, and with no bond or security demanded, at a price which yielded a net profit of *twenty-three cents on every single railway tie that was furnished.* Not only so, but this impecunious man is furnished with the same outfit for carrying out the contract, that the railway had employed for the same service for five hundred and fifty miles, or more than one half the distance of the entire vast enterprise.

And the record of shame has only begun here: after allotting one-tenth to an energetic man to enlist his services: this contract, which was all on the side of the tie contractors, and not at all on the side of the general government which was supplying the money, was parcelled out among Dr. T. C. Durant's friends; his own brother getting three shares, Mrs. Train getting one share, and so

on. And there is not one scintilla of proof that any body put a single cent in the concern, except the United States (which got *no* share, but advanced all the capital), and one Ruth, who lost $2.600.

It is true T. C. Durant says something about holding securities for W. F. Durant and Mrs. Train, but there is no proof that either one put a cent or a security in it; and, as matter of fact, they did not do so. The whole enterprise, from Tie Siding to Ogden, was carried on with the fixed capital of the United States in the saw-mill, outfit, &c., and in its current capital, in payments; and in addition, by the credit which the Appellant as a Banker, and other Bankers, and the merchants and business men of the community, gave it.

The entire evidence shows that it was a monstrous GRAB: that there was no legitimate business in it. Politics and social combinations controlled the entire affair: and the rogues fell out in the division of their plunder, but honest men did not (according to the adage) get their due.

The Referee judicially established the fact, that in the delivery of the first million of ties, there was a nett profit of $223.000.

And it likewise transpires that it was all sunk and a great deal more (which the business men of Wyoming had to suffer), in the furnishing of less than one million thereafter.

Now the money was not legitimately lost—at least it *probably* was not; some one got it: the money which this commercial paper represented, with the rest.

Why should Appellant, whose money and eastern credit aided the ligitimate part of the enterprise, lose his whole fortune by this enterprise? He was in no default.

Appellant cannot be taxed even with carlessness in crediting the firm as he did. He had been introduced to Mr. Durant, whom he knew to be a man of wealth and character, as a member of the firm; and he likewise, with an excess of prudence, sought out the cashier of the firm, and from him ascertained who were the individuals to whom he might look for payment of any liabilities of the firm. Being assured that the names given, offered complete responsibility, he gave the concern unlimited credit, loaned it money, cashed its commercial paper, signed its appeal bonds; and thus gave them the most valuable material assistance in the prosecution of their enterprise.

That Appellee, while putting nothing into the enterprise either of service or money, expected to get a large amount out, is much more than probable, by just inference from the evidence. That he knew what T. C. Durant knew, on this subject, cannot be gainsaid: and T. C. Durant, who had closely watched the delivery of 500 miles of ties, and the expense thereof, knew pretty well what the profits would be for 1.000.000 more. This profit proved to be $223.000.

Is it probable, or reasonable to suppose that Appellee should desire to retire from a business, which in less than one year, without the investment of a cent, and the giving of but two weeks labor, had returned to him a profit of $75.000?

The answer is: it is *very improbable.*

Is it shown by evidence that he did violate the improbability of the case, and retire?

The answer is, there is *not a scintilla of proof that he did actually retire or withdraw from the same connection which had allied him all along to the concern* till he brought the N. Y. suit.

If this asseveration is untrue, its falsity can be easily shown: but in this connection, let it be observed, that a statement by a party that he is going to perpetrate an act, is not a perpetration thereof.

So Appellee did not withdraw in fact; and *a fortiori*, not so far as creditors were concerned: and having extended this partnership in order to participate in the profits, he must not decline his share of the losses: not even though the losses accrued through the dishonesty of his partner. This, upon fundamental principles of copartnership law.

It is by reason of the inherent dishonesty of the mode of carrying out the whole scheme, that such an absence of business methods are witnessed. We can well enough imagine that Davis should seize the whole contract himself, if he had not been constantly restrained by T. C. Durant, whose will was the supreme law of the enterprise; and whose brother, the Appellee, could not be displaced from a participation in the profits. The graphic and lucid evidence of Mr. J. M. Woolworth upon this subject is worthy of full consideration, as it illustrates this subject in a clear light.

The same absence of business methods and presence of duplicity, appears when it was found that a mass of debts existed after November 1868, with no assets to counterbalance them. Of course, every one wanted to shove off from this sinking craft then: and Davis and Gessner whom the rest tried to make "scape goats" of, also tried to hold *them* on; and if, in this unseemly conflict between men who embarked in an unholy crusade against the Treasury of the United States, it is puzzling to determine when, or if, the bond of union was sundered; it is nowise in doubt that those persons whose means and credit were

engulfed in actually carrying the enterprise triumphantly through, should have a right to compel the entire partnership to respond to their appeal for reimbursement, no matter what the secret intentions, hidden actions or internecine dissensions of these partners might have been, behind the scenes.

The power of demoralization which may be superinduced by carrying through such a scheme as the construction of the Union Pacific Railway with government funds, in the way and mode that this was done, is exhibited in a forcible manner, by the appearance of T. C. Durant in this case in 1870, and again in 1877, as a witness.

Such cross purposes and tergiversation in making statements under oath, was never, probably witnessed in a judicial proceeding: and, for the honor of human nature, it is to be hoped, never will be again.

In 1870 when swearing to a statement made in the name of all the trustees: he has "NO KNOWLEGE "OR INFORMATION SUFFICIENT TO FORM A BELIEF "AS TO THE EXISTENCE OF A PARTNERSHIP UNDER "THE NAME OF DAVIS, SPRAGUE & CO., or of the per- "sons composing any such firm, or of the business of such "firm."

Then he was obliged to swear to the truth, as he was in the presence of the Board of Trustees of the Railway, whose organ he then was.

But when he got out of their presence his version of the same subject is as follows: "I know ALL about the mil- "lion tie contract. *The million tie contractors conducted* "*the business of the contract under the name of* DAVIS, "SPRAGUE & CO." The name DAVIS, SPRAGUE & CO. "WAS PROPOSED AND ADOPTED."

Both these items are comprised within that offered by Appellee.

Comment is scarcely necessary. While the former statement under oath was not attended with the formalities necessary to constitute it as technical evidence; it nevertheless is an admission under oath that the formal evidence which he gave to aid his brother in his extremity is *not true*.

IV.

IS THE NEW YORK SUIT *RES JUDICATA?*

The title of the New York suit was as follows, viz:

"William F. Durant, Mordecai B. Sprague and Pierson "S. Mattox, Plaintiffs.

"vs.

"Timothy P. Richards, James W. Davis, James H. Gess- "ner, William Ruth, John Doe and Susan Doe, composing "with the plaintiffs, the firm of Davis, Sprague & Co., "James W. Davis, James H. Gessner, John Brown, Wil- "liam Brown and Sarah Brown, as copartners, composing "the firm of J. W. Davis and Associates, Thomas C. Du- "rant, Oliver Ames, John Duff, Sidney Dillon, Henry S. "McComb, Cornelius S. Bushnell, Benjamin E. Bates, and "Elizabeth Davis wife of James W. Davis, Defendants." (Record p. 171.)

"At a special term of the Supreme Court (of New York) "held on the 11th day of November A. D. 1870," in this

case, "on motion of Clark Bell, Esq. attorney and counsel 'for the plaintiffs * * it is ordered that all per- "sons, parties and corporations having claims against the "firms of 'Davis, Sprague & Co.' and 'James W. Davis "and Associates,' or either or both of said firms, present "the same, together with their proofs in support of the "validity thereof, to A. A. Redfield, Esq. the Referee, "heretofore appointed in this action, at his office No. 20 "Nassau Street, in the City of New York, within twenty "days from and after the service upon them, respectively, "of a copy of this order. And it is further ordered, that "any claim against either of said firms not so presented "within the time above limited, shall be excluded from "participation in the fund in question in this action, and "from all funds that may come into the hands of the Re- "ceiver herein." (Record p. 188.)

The Appellant's action under and by virtue of this order is thus stated.

APPELLANT TESTIFIED; (Record p. 11.) "I "knew of the existence, in the Supreme Court of the State "and County of New York, of a suit in which Durant, "Sprague and Mattox were plaintiffs, and other members "of James W. Davis and Associates were defendants. * "* Through my attorney, William E. Stiger, I "presented the commercial paper, which I have stated, I "owned, in that suit, to the Referee as a claim against "James W. Davis and Associates."

Q. "Did you receive notice, general or special, to make "proof or litigate concerning the persons who composed "the partnership of James W. Davis and Associates?

(*Objected to.*)

A. "I never did; I never had any notice what I would "be required to prove, or what would be in issue, so far as "I was concerned, except the order of Court, made, requir- "ing claimants against that firm to file their claims. My "proof was confined to my claims." (Record p. 12.) "I "received, by reason of the adjudication in that suit, about "fifteen per cent. of the amount of my claim, which was "allowed. I never made any agreement, admission or "stipulation whatever, or authorised my attorney to do so, "at the time I received this amount." (Record p. 16.) "I never had any notice in the New York suit, except a "verbal request, that I remember of. I heard at the time of "this suit in New York, that it was a matter of contro- "versy in regard to some of the claims presented, as to "whether they should be allowed against a firm called "Davis, Sprague & Co. or against a firm called James W. "Davis and Associates. I don't remember of its coming "up particularly, except its being talked of amongst the "parties that were there."

WILLIAM E. STIGER TESTIFIED; (Record p. 21.) "I appeared as attorney for Rogers in the suit "brought by Durant and others, against Davis and others, "at his request. His instructions were to prove his claims "and see that they were allowed by the Referee,—proving "his claims and getting his money for him. * * I "presented this commercial paper to the Referee, and "nearly all were allowed for the amount claimed. * * "So far as Rogers was concerned, his issues in this suit "were simply as to the justice and amount of his claims. "I was not called upon or notified on behalf of Rogers to "litigate anything more than what I have stated. Upon "two or three pieces of the paper, a trial was had as to the "amount due Rogers thereon. * * I think there

"was an issue made in this suit as to the ownership of "only one or two pieces of the commercial paper I have "enumerated." (Record p. 22.) "Neither I nor Rogers "to my knowlege, ever received any notice to offer proof "or litigate concerning the question as to who composed "the firm of James W. Davis and Associates. That ques- "tion was not considered at all by Rogers or me before "the Referee.

Q. "State if you made any agreement by stipulation, as "the attorney of Rogers, in the New York suit, to waive "any further claim or demand against James W. Davis "and Associates, or any of the individual partners therein, "or any parties holding themselves out to the world as "partners therein, on behalf of the commercial paper of "which you have given a list above?"

(*Objected to.*)

A. "I did not. A dividend of about 15 per cent. was "paid on this paper," &c. "No demand or agreement was "made at the time I received this dividend as to waiving "any further claim. * * The only paper that "was ever served on me in that case, was a copy of a pro- "posed decree to be entered therein." (Record p. 23.) "The proposed decree contained a clause making the cred- "itors who had proved their claims before the Referee, par- "ties to that action, and bound by the findings of the "Referee therein, and I appeared before the Court on the "settlement of the decree and objected to this clause, and "the Court ordered it stricken out." (Record p. 50.) "Rog- "ers told me when he first employed me, to prove his "claim against the fund."

(Record p. 25.)

Q. "In making proof of the commercial paper in the "New York suit, &c. state if you were required to prove "who the persons composing the firm of James W. Davis "were?"

A. "I was not."

CORNELIUS CHRISTOPHER TESTIFIED: (Record p. 50.) "I knew of the suit in * * New "York * * brought by Durant, Sprague and "others." (Record p. 51.) "I presented my claims. * * "We were allowed to make only such proofs as apper- "tained to our claims direct; that is, proving the validity "thereof. * * I did attempt to prove who were "the partners, before the Referee in that case, but he ob- "jected to such evidence coming in, stating that we were "simply proving our claims, and that was all we could do "against the firm or firms as he claimed it. * * My "attorney made an application to make me a party, and "an argument upon it I think, but the motion was denied."

HENRY BRODHEAD TESTIFIES; (Record pp. 46, 47.) "I am an attorney. * * I made an applica- "tion to the Court to have Christopher (a claimant) made "a party. Here is an affidavit" (Record pp. 168, 169, 170.) "on which I applied for leave and attached to it is the or- "der to show cause, which served as a notice of the mo- "tion. The Court denied the motion."

BENJAMIN F. BUNKER TESTIFIES: (Record p. 81.) "I know the New York suit, and was clerk for both "the Referee and the Receiver." (Record p. 82.) Rogers "presented claims, and testified about the claims he pre- "sented, * * I think his testimony was mostly, or per- "haps chiefly, in reference as to whether he owned those "claims, or held them as collateral, the amount of them, "and matters of that nature." (Record p. 85.) "I do not

"understand that Rogers made any effort to have claims "which were against Davis, Sprague & Co. allowed "against Davis and Associates or the reverse." (Record "p. 81.) There was a fight between the members of Da- "vis, Sprague & Co. and James W. Davis and Associates. "The first firm claimed that the last owed them a large "amount of money. Davis and Gessner claimed that the "firms were the same in fact. * * This issue was tes- "tified about *early in the case, and was prominent.* THEN "AN ORDER WAS MADE TO BRING IN CREDITORS," &c.

AMASA A. REDFIELD, Referee, testifies: (Record "p. 43.) "My impression is, the rights of the parties be- "tween themselves and their claims against the railroad "were substantially adjudged before the claims, or any "great portion of them were commenced," &c. * * "I "think the main issue in this case was substantially tried "before the question of the rights of different creditors was "entered upon."

DANIEL W. GILLETT TESTIFIES: (Record p. 36.) " * * Counsel for Davis and Gessner in New "York suit. * * * The issues made on Roger's "claims were as to the validity of these obligations: the "consideration received by the contractors, for which the "paper was given, and the question as to whether or not "Rogers had paid them, it being claimed in several cases "by Davis that the paper alleged to be in Roger's pos- "session had not been paid by him." (Record p. 38.) * * "The main issue in the case, was the question as to wheth- "er the firm of Davis, Sprague & Co. was ended upon the "completion of what is known as the million tie contract, "or whether it continued under the new name of James "W. Davis and Associates, for work done beyond the mil- "lion tie contract, and *upon that issue the creditors were not*

"*heard, except as witnesses,* the same as others. Rogers "appeard in that action as a party only to prove his "claims against the tie contractors. * * "

Q. "Was not the main issue conducted entirely inde- "pendent of the proving up of the claims of the creditors?"

A. "It was." (Record p. 36.) "I dont know of Rog- "ers offering any proof as to who composed the firm of "James W. Davis and Associates," (Record p. 37.) On Cross Ex. witness states: "I don't remember that any "of the persons who presented claims before the Referee, "filed intervening petitions or any written pleading describ- "ing their claims." (Record p. 45.) "I should not think "that the claimants referred to in that order, (of Nov. 11.) "would have the right of appeal from any decision which "might be made under it."

From the above array of evidence, and especially if the whole record of the New York suit contained from p. 170, to 230, be considered, it will appear that there were several sets of parties to this famous suit, involving numerous and complex issues. There were several *main* issues involved (so called by the witnesses) raised by specific allegations, and denials and counter allegations in Bill and answers: and there were collateral or side issues: *ex gr.*, certain parties in Mass. sued out trustee processes against J. W. Davis and Associates: that constituted a side issue, and was in no wise related to the main issues. And there were other side issues and collateral questions also, having no reference to the main issues.

The main issue was as to the partnership, and it was "*substantially adjudged*" as the Referee testifies, before the claims were heard: or as Bunker puts it, "this issue "was testified about *early in the case. Then*" (that is afterward,) "an order was made to bring in creditors" &c.

So that claimants have never had their day in Court upon the main question, viz, that of the partnership; for as the law is stated, "Estoppels conclude only parties or "their privies. Parties are all persons having a right to "control the proceedings; to make defence; to adduce and "cross examine witnesses; and to appeal from a decission, "if an appeal lies."

Bigelow on Estoppel, p. 46.

For inasmuch as the issues were completed in this case before November 2d, 1879, (Record p. 186.) Appellant had no right to control the proceedings or to make defence, inasmuch as the order admitting him for any purpose, was not made till November 11th, thereafter, and Roger's claims were not presented till the Spring of 1871: nor had Appellant any right to adduce and cross-examine witnesses; inasmuch as the issue we are now contending about, had been heard and substantially adjudged before the matter of Appellant's claims had been entered upon at all, according to the Referee: or, according to Bunker before the entering of the order.

On November 2d, 1870, (Record p. 186.) an order was entered in this cause referring "all the issues" to Redfield, and likewise ordering him to "state an account of all claims justly chargable upon the fund "involved;" of course this contemplated that the issues had been made up: and Appellant could not have been a party to them: one of these issues was as to the partnership—the same that is in issue here; these issues had been formed between the parties: and Appellant was not a party or in any way known in the case.

For the benefit of the litigation in that suit, and in order to properly distribute the *fund* therein, a statement of

claims against the *fund* was ordered; and after the main issue had been testified about an order was framed necessary to enable the Referee to state the account against the FUND. And so the order of November 11th was made to subserve that object.

The doctrine of estoppel is clearly defined as follows: "A judgment * * * directly upon the point is, as a "plea, a bar, or as evidence conclusive between the same "parties upon the same matter *directly in question* in "another court." * * * But it is not evidence of any "matter *incidentally cognizable*, nor of any matter to be "*inferred by argument* from the judgment."

Duchess of Kingston's case, 11 St. Tr. 261.

Here the *question directly* in issue is, the *personal liability* of W. F. Durant. There the question was of the right to participate in a *fund* in the hands of the court; and, at the very utmost, if the question of appellee's personal liability came in question, it certainly was only *collateral* to the main question; hence, not within the rule.

The part of the order of November 11th, 1870, which affects appellant may be stated thus, viz: "All persons "* * * having claims against the firm * * * of "James W. Davis and associates * * * present the "same, together with their proofs, in support of the validity "thereof."

The issues thus tendered to appellant, and accepted by him, were:

1st. Whether he held any claims against the FIRM of James W. Davis and associates as an *institution*, totally regardless of its component parts.

2d. Whether he owned them.

3d. Whether these claims were *valid;* that is, whether they had "received all the formalities required by law."

Bourier 2d, p. 619.

4th. The amount thereof.

When appellant presented a lot of claims the first and third issues were not contested; because, as Bunker testified (Record p. 97) "these claims were all drafts or checks "which were against James W. Davis and associates *on* "*their face.*"

The other two issues were contested, and the decision was that appellant was the owner; and the amount due was fixed at something less than appellant's claim. Those four issues were the only ones tendered to or litigated by appellant, or upon which he made proof. Claimants were not invited to offer proofs, or to resist proofs offered, as to any of the other issues in the suit, however deeply they might be involved or affected thereby. That some of the claimants attempted to go beyond the terms of the order in arraying their proofs does not matter. It was simply extra judicial and *ultra vires*. Appellant very properly made no such attempt, but complied strictly with the terms of the order in making his proofs as is testified to by Bunker as heretofore cited.

Although there were many issues decided in this case, the above four were the only issues decided affecting appellant, or binding him, or in which he was in any wise concerned; or in which he was allowed by the terms of the order, which was his only authority for being there at all, to contend, or contest, or appeal from.

The inquiry in the New York suit was whether he had a claim against a *firm*—an entity—an institution; the name of which institution was "James W. Davis and as-

sociates;" the inquiry was not who or what made up, or inhered in, that institution; it mattered not for his purpose, who its members were, whether they were many or few, whether they were solvent or not; whether they were named Durant or Smith, and he was entitled to no personal judgment. The sole inquiry was, have you a claim against that concern? Because if you have, you shall share in a *fund* which belongs to that concern; and this, regardless of who composes it; if he had raised and established in his favor the immaterial issue, that Durant was a member of the institution, it would not enable him any the more surely to have attained the object of the inquiry so far as he was concerned, viz: to participate in the fund; in like manner if any one else chose to raise and establish the collateral and immaterial issue that Durant was not a member of the institution, it could also have no effect on his right to a participation in the fund; in other words, his duty and privilege ended when he proved his claim against this institution; (ev. of Stiger p. 21), and if any one attempted to analyze and resolve into its primitive elements this institution, it was not appellant's concern, and does not bind him.

If it shall be claimed that the issue of whether Durant was a partner in this firm arose because the Referee considered it, the answer is that it did not arise under the order to claimants, and hence could not bind them; secondly, that it was not directly in question, hence could not bind appellant in this suit; thirdly, that if that question was involved it was only collaterally, and hence cannot bind him, as an estoppel. (See Duchess of Kingston's case.)

It is a general * * principle that a suit between two persons shall not bind or affect a third person who could not be admitted to make a defense, to examine witnesses, or to appeal from the judgment.

Case vs. Reeve, 14 Johns., 79.

Now in case at bar, if it shall be believed that Rogers, the plaintiff here, could appeal from the decision as to the validity of his claims in the New York suit, it can scarcely be pretended that he could have appealed from the decision as to who constituted the several firms of Davis, Sprague & Co., and James W. Davis and associates.

For Rogers was not made a party to any such issue; there was such an issue in the original suit between the parties thereto; but as to this secondary suit—this branch of the suit in which Rogers had a right to, and did, in fact, appear—nothing was in issue but the ownership and validity of the claims. Admitting that Rogers might have appealed from the judgment if it denied his claim by reason either that he did not own it, or that it was not valid, it does not at all follow that he could have appealed from that part of the decision which adjudged how much was due from the U. P. R'y to Davis, Sprague & Co. or to Jas. W. Davis and associates.

The law is well settled that to create an estoppel the former judgment must be on the same matter, between the same parties, and for the same purpose.

Smith's Lead. Case, p. 796.
Aspden vs. Nixon, 4 How. 497.
Aiken vs. Peck, 22 Vt. 255.
Smith vs. Sherwood, 24 How. 333.

Now in case at bar, the purpose is to get a personal judgment against the members of the firm of James W. Davis and associates, and against all persons who held themselves out to the world as members of that firm. In the case set up as an estoppel the purpose was to participate in a judgment against a fund, a judgment *in rem*. Again, it has been adjudged that "where the cause

"and object of both actions are the same, a judgment in "the prior bars the suit. Where the cause and object of "the actions are different, the prior judgment is no bar to "the subsequent action."

Nickerson vs. Cal. Stage Co., 10 Cal. 520.

Again, the doctrine of estoppel is restricted to facts directly in issue, and does not extend to facts which may be in controversy, but which rest in evidence and are merely collateral. A fact or matter in issue, is that upon which plaintiff proceeds in his action, and which the defendant controverts in his pleadings; while collateral facts are such as are offered in evidence to establish the matters or facts in issue.

Freeman on Judgments, sec. 257.
King vs. Chase, 15 N. H. 9.

These statements of the law totally exclude all idea that the New York case is a bar to this proceeding; nor would it have been of any consequence if appellant had been a witness in the New York suit, for he had no control of the action nor right of appeal.

Bigelow on Estoppel, sec. 68 n.

The following very refined distinction was made: "The "question in this case is, whether the note sued on is valid "as against G. W. P. The question in the former suit was, "whether it was valid as against G. W. P., X. and Z. The "questions are not identical, though that in the former suit "being more comprehensive might have determined that "embraced in the present. * * The note may be valid "as to G. W. P. and void as to X. and Z."

Stingley vs. Kirkpatrick, 8 Blackf. 186.

The practical question here is, whether this paper is valid as to appellant; in the New York case the question was,

whether it was valid as to a fund belonging to a firm called James W. Davis and associates.

The following statement of the law is given on authority: A judgment is conclusive upon the parties thereto only in respect to the grounds covered by it, and the law and facts necessary to uphold it; and, although a decree in express terms purports to affirm a particular fact or rule of law, yet if such fact or rule of law was immaterial to the issue, and the controversy did not turn on it, the decree will not conclude the parties in reference thereto.

Woodgate vs. Fleet, 44 N. Y., 1.
People vs. Johnson, 38 and 63.

Nothing can be clearer in logic than this: That the only material facts in the case below, so far as this appellant was concerned. was whether this was the paper of the institution called "James W. Davis and associates;" whether it was valid; whether appellant was its owner; what was the amount; and *other* facts were immaterial to the issues in that suit; and, while those facts are necessary here, yet appellant must show other facts in order to recover in this suit; hence the former suit cannot by the logic of these cited cases, be a bar.

In a case where the issue was, whether anything was due from defendant to plaintiff, an estoppel was interposed of a suit between the same parties where an account of how much was due, had been tried. But the court rejected it as an estoppel, saying: "It is true * * in conse-"quence of the nature of the dealings between N. and Z. "it was probably necessary to take and state an account "between them which would show how much was due "upon the mortgage, in order to determine whether any-"thing was due; but the evidence and inquiry as to the

"amount due was merely incidental or collateral to the di-
"rect issue whether anything was due," etc.

Campbell vs. Consalus, 25 N. Y. 616.

In case of Putnam vs. New Albany, (4 Biss. 365) the case was thus:

A, B and C held a judgment against a R. R. Co., a part of which was satisfied. They filed a Creditor's Bill against the R. R. Co. and the city of New Albany and several citizens of that city, alleging that the city and the citizens sued were indebted to the R. R. Defendants, among other defences, raised that of *res judicata.*

To sustain this defence they introduced a record of a prior suit, in which one Lindley brought suit upon bonds of the same kind as those in which A, B and C had obtained their judgment as aforesaid. Said prior suit was brought by Lindley "for himself and for all others holding "bonds similar to those held by him."

And A, B and C appeared in that prior suit, and "joining in the complaint therein, filed separate answers, averring "that they were the owners and holders of certain of the "bonds described in the mortgage mentioned in said com-"plaint, and severally demand judgment for the amount "due on their several bonds and the relief asked in the "complaint." (But it did not appear that the answer was replied to, or that issue was taken on it.)

The Court heard the prior case, and found that all the bonds, including those held by A, B and C, had been fully paid, satisfied and discharged.

And yet the Court, in the case in which the defence of *res judicata* was set up, refused to allow that defence as a bar, upon the ground that the distinct and precise point of

payment, satisfaction or extinguishment of the bonds was not heard in the former suit.

It is true that the judgment of the Court which was invoked as *res judicata*, did expressly decide that the bonds had been fully paid, satisfied and extinguished; but the Court in which the defense of *res judicata* was raised refused to consider this as *res judicata*, because the issue of payment, satisfaction and discharge of those particular bonds was not distinctly made; and although that issue was incidentally in question in considering if any of the bonds had been paid, yet it was not so distinctly in issue as to bar a further investigation.

But in case at bar, an attempt was made to show that evidence was permitted to be given by claimants in the New York case of the personnel of the two alleged partnerships.

That no right to do this existed, is shown by the order itself; and that Rogers did not attempt to do it, is shown by the evidence of Bunker.

But the case of Putnam vs. New Albany went farther than is claimed in this case; in that case it was proved that the parties verbally agreed to let in evidence under the answer filed, touching the payment and satisfaction of the bonds in question; but the Court would not even allow this; much less, therefore, should evidence be allowed to bar us, which was let in, not only not under a distinct issue formed, but without even an agreement by the parties to let it in, to support it.

The following cases are also cited:

Buck vs. Colbath, 3 Wall. 334.
Smith vs. Sherwood, 4 Conn. 283.
Lawrence vs. Hunt, 10 Wend. 83.
Kimberly vs. Ely, 6 Pick. 440.

It is in proof that appellant received from the fund, under the order in the New York suit, fifteen and one-half per cent. upon the amount of his claim. Of course, this concludes him as a payment to that extent, and this he freely admits; but it binds him no farther or stronger. This fifteen and one-half per cent. was derived from a fund set apart for the creditors, and sustains the same relation to the entire debt that partial receipts from the sale of mortgaged property would sustain to the mortgage debt, viz: a payment *pro tanto*, leaving the primary debtor liable for the balance.

Appellant was only a party *sub modo* to the New York suit; and only as to such issues as were presented by the order of November 11th, and only as to what transpired after that order, and not as to the main issue of partnership which had been substantially tried before. If the main issue had been at all, even in the slightest degree, entered on before the issuance of this order, appellant is not bound by it; he certainly had a right to participate in the whole litigation on that point, to be bound by it as an estoppel, but it was not only entered on but substantially tried before appellant had anything to do with the suit.

Again, Mr. Durant's attorney, Bell, tried to inject an estoppel into the decree which the Court expunged. That, of itself, should be conclusive against it. (Record pp. 22, 23.)

It was claimed by appellee, in the Court below, that one of the issues presented to us in the New York suit was, "By whom was the amount owing?" A sufficient reply is, that the inquiry was "By what firm (not what individuals) was the debt owing?" Let it be recollected that appellant was not a litigant in this case except to prove up his claims. His appearance was ancillary to the suit; he was

not a party to it. This Court did not presume to collect his debt for him, or even to render judgment against the debtors, who were the members of James W. Davis and associates; but the sole object of this Court, so far as appellant was concerned, was to equitably distribute a fund that had drifted into court, between the persons who were entitled thereto. If appellant and other claimants desired to collect their debts, they should implead the debtors in court, when an entire adjudication, involving the liability from any cause (and not merely from the fortuitous custody of a fund) could be had and determined.

Nor is it allowable for appellee to show by parole what questions arose or were determined, or what evidence was adduced in the New York case, unless the order of November 11th, 1870, was vague, and this cannot be claimed.

Putnam vs. New Albany, 4 Biss. 365.
Duncan vs. Holcomb, 26 Ind. 378.
Mills vs. Caldwell, 2 Wall. 35.

The doctrine is as old and familiar as courts, that "what "has been done in a court of record must be proved by its "record; and to prove it by parole would violate the plain- "est principles of law," and this can only be trenched upon "when the form of the issue in the trial relied on as an es- "toppel is so vague that it does not determine what ques- "tions of fact" were tried, which cannot be pretended of the order of November 11th.

To recapitulate therefore:

1st. The order of November 11th embraces every point directly in issue in the New York suit, so far as appellant was concerned.

2d. The evidence shows that Rogers made no attempt to prove anything but the points thus directly in issue.

3d. If other parties, tie contractors, or R. R. trustees proved other matters in resistance of Rogers' claims, or for other reasons, they were only collateral, or incidental, to; or evidence in support of, or adverse to, the precise point involved, or matters directly in issue, and hence do not bind us as an estoppel.

4th. And parol proof of what was considered, is irrelevant, in view of the fact that there is no vagueness or obscurity about the matters in issue so far as Rogers is concerned embraced in the order itself.

5th. It was not at all necessary to sustain the issues in the New York suit, so far as appellant's branch of the case was concerned, to show that appellee was a partner in the firm of James W. Davis and associates; it being sufficiently proven by showing that the paper was that of said firm as an institution; but it is necessary in this suit to prove that appellant was a member of said firm; hence the issues are not the same.

And for these abundant reasons the Court below, notwithstanding a manifest hostility to appellant's theory of his case, was compelled by his astute knowledge of the law to coincide with the views contained in this brief, as follows: (Record p. 242.) "I think complainant only en-"tered that Court for the purpose of proving his right to "participate in a fund that had been paid into that Court; "and was not really a party litigant to the issues as to who "were the members of the firm of Davis, Sprague & Co., "and the firm of J. W. Davis and associates."

V.

DID THE APPELLEE HOLD HIMSELF OUT TO THE WORLD AS A PARTNER OF JAMES W. DAVIS AND ASSOCIATES, SO AS TO BIND HIMSELF, INDEPENDANT OF THE ACTUAL FACT ITSELF, OR ITS ADJUDICATION IN THE NEW YORK SUIT?

This has no necessary reference to the question whether he was or not, in fact a partner.

In urging this matter, we entirely lose sight of the actual facts, as to the partnership; and proceed upon what appellee individually did, or suffered to be done, or omitted to do, by which appellant was induced to believed that he was a partner.

Appellee need not have been a partner at all, in any portion of the enterprise, in order to render himself chargeable under this head.

No pretense is made, or can be made, that this branch of the inquiry was considered in the N. Y. suit; it is not even hinted at in any of the pleadings or findings of the Referee: it is not a matter which concerns any of the other partners, or any of the other creditors: it is a matter between appellant and appellee alone.

That appellee did thus hold himself out as a partner, plainly appears from the evidence.

1st. He was confessedly a member of the firm which executed the "million tie" contract; he was there, and opened and kept a lumber yard for this firm; he was introduced by Mattox, the cashier, as one of the partners of James W. Davis and Associates, and took an interest in the management of the business. (ev. of Rogers, Record p. 17.)

2nd. He knew that the "million tie" contract had ended in the Fall of 1868, (Record p. 61.) and was in fact in the territory, and as far west as Ogden in Utah in the early part of 1869, (Record p. 61.) and yet never at any time, until the bringing of the New York suit, did he give any notice to the world that he was not a partner in the new dispensation.

3d. He gave notice, he says, to two several persons, viz; to T. C. Durant and to James W. Davis that he would not be a partner after the conclusion of the "million tie" contract: but the information spread no further, and certainly did not reach to Wyoming, where appellant has had all the business men on the stand in this case.

So thoroughly did he keep his secret that he was not a partner in the concern, that his own brother, T. C. Durant, did not know it; (Record p. 150.) the lawyers of the concern, Steel, Corlett and Woolworth, did not know it: (Record pp. 154, 111, 152.) not a single solitary business man in Wyoming knew it; (Record pp. 114, 116, 118, 119, 120, 122, 124, 131, 132, 133, 134.) the superintendent of construction of the U. P. R'y did not know it: (Record p, 139) every one on earth but the general utility men of this case, viz: Mattox, Bunker and Ruth, were oblivious of it, and they only knew of it from inspiration or intuition as it would seem from their positive mode of swearing, without reasons: and certainly not from Durant; and even they told nobody, except Mattox, who says he told everybody: but it seems to have been a fruitless dissemination of knowledge, as nobody seems to have known that he did so promulgate it but himself: but even he admits he did not inform appellant. (Record p. 58.)

The community, including complainant, was still further impressed with the belief that the firms were identical and that there had been no change, from the accomodating way in which they took up the liabilities of Davis, Sprague & Co., with paper of James W. Davis and Associates, (as is testified to by several witnesses heretofore referred to) and by the more significant fact that they paid the joint bills of the two firms with acceptances of one of them as is testified to by Corlett: and by the equally significant fact that they instructed their lawyers to defend suits against the firm in either name: and that it was so done, and no question of misnomer or personnel of either partnership being raised: and payment finally being made to their lawyer by paper of one of the firms. (ev. of Corlett. Record p. 114.)

If the community (including Rogers) wanted further proof, it was present in the uniformity of management and managers of the business from beginning to ending—in the potent fact that the books of accounts were continuous and uniform from first to last—that the Superintendent of Construction of the railway knew of no change at all at any time—and in the conclusive fact, that of nine partners, not a single one (except Mattox himself) ever informed the public, in any way, of a change: (and Appellee, at least, was out there and might have done so.)

The law as applicable to this branch of the case, is singularly clear, and well defined. It is variously stated as follows, viz: a withdrawing partner "should give personal "and special notice of the withdrawal of his responsibility to every one who had before received personal and special "notice either by words or acts of his actual responsibility "and interest in the copartnership."

Vernon vs. Mahattan Co., 22 Wend. 183.

A bank having had previous knowledge of the existence of the firm of Dearborn & Co., of which the defendant McChesney was a member, discounted a note made in the firm name, but after the partnership was, in fact, dissolved, without knowledge or information on the part of the bank; it was held, there being no publication of dissolution, that the retiring partner was liable.

City Bank of Brooklyn vs. McChesney, 20 N. Y. 240.

Nelson, J. thus defines the law: "One partner may "bind another after dissolution of the firm, if the payee or "holder of the note is not chargable with notice, express "or constructive, of the dissolution of the partnership (6 "R. I. 144; 6 Cow. 701), and that such notice must be "specially communicated to those who had been customers of the firm," etc.

Bristol vs. Sprague, 8 Wend. 423.

To the same effect in—

Ketcham vs. Clark, 7 John. 147.
Wardnell vs. Haight, 2 Barb. S. C. 552.
Pratt vs. Page, 32 Vt. 11.
Pars. vs. Part., pp. 412, 413.
Story on Part., sec. 64, 65.

Parsons states the rule of notice to be thus: "In respect "to persons who have had dealings with the firm, it is nec- "essary to show either notice to them of a dissolution, or "actual knowledge on their part, or at least adequate "means of knowledge of the fact."

Pars. on Part., p. 447.

Again, it is said, that "a partner who actually retires as "to all his rights and interests, may consent to leave his "name in the firm, or to a use of it by the old partners: "and while he thus consents, even by his silence alone, if he "knows it, he does not retire as to his responsibilities."

Pars. on Part., 414.

And the law has also been thus declared: "A customer "who knows that he (a partner) has retired as to his inter- "ests, but has no notice of the retirement, may be led to "believe that notice is withheld because the partner intends "to continue responsible. And if he is justified in this be- "lief by all the circumstances, however erroneous it might "be, the mere knowledge on his part of the retirement "without notice would not prevent him from holding the "partner." (Ib. 414.)

To the same effect in—

Chemung Bank vs. Bradner, 44 N. Y. 680.
Hammond vs. Aiken, 3 Rich. Eq., 119.
Mitchum vs. Bank, 9 Dana 166.
Lindley on Part., p. 407, and cases cited.

In an action to recover on a note of November 29th. Held, that a partner who had retired on November 16th, and published it in the papers, was yet liable, not having given actual notice.

Rose vs. Coffield, 53 Md. 18.

The case of Lovejoy vs. Spofford was a case which arose upon commercial paper, where it was sought to charge Lovejoy as a partner of J. B. Shaw & Co. In fact, Lovejoy was not a member of that firm when the acceptance was made, the firm having been dissolved for more than three months by an instrument in writing. In this case,

however, "formal notice was given to all those who had "previously dealt with the firm. It does not appear "whether there had been any change by signs, nor whether "the firm had any external sign. No evidence was given "that notice of the dissolution was published in any news- "paper, and it was proven that two daily papers were pub- "lished in Davenport at the time of the dissolution. After "that time the business was carried on in the name of J. "B. Shaw alone. Prior to the present transaction, the "plaintiffs, in discounting its paper, had heard of the firm "and who were its members. They testified that they had "no information of its dissolution till some time after its "occurrence."

And the Court, in that case, recognized the doctrine that notice must have actually reached the claimant; or that the retiring partner must have used diligence in giving notice of his retirement to exonerate him from liability.

Lovejoy vs. Spofferd, 93 U. S. 430.

Let it now be shown that by the rule in Lovejoy vs. Spofford and the other cases cited, the appellee must be charged in this suit;

1. Appellant knew that Appellee was a partner of James W. Davis and Associates.

The evidence is as follows, viz:

APPELLANT TESTIFIES: (Record p. 11.) "when "I first knew this association in Wyoming, it was known "to the public generally as James W. Davis and Associ- "ates. * * The firm had no sign out." * * (Record p. 17.) "Durant held himself out to the world as "a partner in James W. Davis and Associates in this way. "The first time I met him, he was introduced to me as one

"of the partners by Mr. Mattox. He was there for a "short time and took an interest in the management."

CHRISTOPHER, (cashier of the firm) testifies: Record p. 51.) " * * In May, 1869, when we had "some trouble at Piedmont with the contractors of the "road, Rogers was solicited by a great many parties to "cash the paper that the firm had given to sub-contract-"ors, and Rogers came to me, and asked me who com-"posed the firm of Davis and Associates, and I told him as "it was given to me by Davis and Mattox, that it was "Davis, Sprague, Durant, Richards, Ruth, Gessner and "Mrs. Train. * * *He said he always wanted to "know who composed a firm with whom he was dealing.*"

And Durant admits that he was a partner in the firm that executed the million tie contract.

2. Did Appellee give to Appellant in particular or the public in general any notice of his withdrawal from the firm, or of its dissolution?

Let us search the Record and see: for if he did not do this, or if Appellant did not get notice otherwise, then Appellee is liable, on uncontroverted principles of law.

The Record is as follows, viz:

The Bill, which is verified, avers, (Record p. 3.) "that "complainant had no notice of any dissolution of, or "change in the persons composing said partnership at "any time between November 20th, 1867, and January "1st, 1871."

APPELLANT TESTIFIES: (Record p. 12.) "There "were two daily newspapers published in Cheyenne: one "of them all the time I was there. No change of firm was "ever inserted in these papers that I saw, and I was fa-

"miliar with them and read them daily. * * I "have never had notice of any withdrawal of any members "of the original firm of James W. Davis and Associates, "or any change in that firm until this suit in New York."

CHARLES D. SHERMAN TESTIFIFS: (Record p. 19.) "There were two daily newspapers printed in Chey- "enne, which I read without ever seeing any notice of "change in the firm that was furnishing ties. I never "heard there had been a change in that firm in the Fall of "1868. I saw Mattox and Davis frequently, in November "and December, 1868, and January, 1869: neither of them "told me that Davis and Gessner had acquired the con- "tract for the delivery of ties from November onward, and "had assumed the responsibilities of the tie contract.

CORNELIUS CHRISTOPHER (cashier) testified: (Record p. 48.) "The business wasn't really closed until "after the bringing the suit in New York, at which time "they were still getting out some ties at Piedmont and "North Platte, and a great many accounts were unadjus- "ted, and were being adjusted, all along the line." (Rec- ord p. 50.) "I don't remember the time at which about a "million ties had been delivered to the road. There was "no change made in the membership of this association "during the delivery of ties by it: nor was any settlement "made with the railway company for ties theretofore de- "livered and a new account opened. * * No no- "tice was ever made public of any change in this associa- "tion that I know."

W. W. CORLETT (attorney for the contractors) testi- fied; (Record p. 114.) "I never received any notice that "the firm of Davis, Sprague & Co., had dissolved or ex- "pired."

T. A. KENT TESTIFIED; (Record p. 114.) "Never "saw any notice in any of the newspapers published in "Wyoming of the creation of an association, known as "James W. Davis and associates.

LUKE MURRIN TESTIFIED: (Record p. 118.) "This association carried on its tie business in this section "of country west of Cheyenne from 1867, until 1870. I "read the papers and never saw any notice of the expira- "tion or dissolution, of the firm of Davis Sprague and Co., "or saw any public posters or notice to that effect."

AMASA R. CONVERSE TESTIFIED; "I have "never seen any notice of the expiration or dissolution of "Davis Sprague and Co., and have read the papers regu- "larly." (Record p. 119.)

"THOMAS J. STREET TESTIFIED; (Record p. "120.) I read the papers in '67 '8 and '9; Never saw any "notice of the dissolution, or expiration of Davis Sprague "& Co., or any notice, handbills, posters etc."

ISAAC W. FRENCH TESTIFIED; (Record p. 123.) "I have never seen any notice of the expiration or dissolu- tion of that firm (known by both names) nor did I ever "know of any change in its membership."

JONATHAN E. WILD TESTIFIED; (Record p. 123.) "Never saw any announcement in the public newspapers "or otherwise, of the dissolution or expiration of the firm "of Davis Sprague & Co."

DANIEL McLAUGHLIN TESTIFIED; (Record "p. 131.) I never seen any announcement of the termina- "tion of the firm of Davis Sprague & Co. * * * "I never heard of any change in the firm name, nor saw any notice of change in the organization, or name of the firm."

J. M. WOOLWORTH (an attorney of Omaha,) TES- "TIFIED; (Record p. 147.) attorney for Davis and Ges-

"ner, (Record p. 125.) "It is a very hard question to answer "whether or not, as a matter of fact, Davis Sprague & Co. "and James W. Davis and associates, were different names "for precisely the same firm and association of individuals, "and for the same business." * * (Record p. 153.) "I do not know that any public notice was ever given in "Nebraska of a change of firms by any of the tie contrac- "tors."

So that the following propositions are clearly established, viz:

1. That Appellee was in Wyoming in 1868, as a member of the firm furnishing ties and lumber for the R. R. and opening a yard also for the sale of lumber, being introduced to appellant by one of the other partners, as a member of the firm of James W. Davis and associates.

2. That appellee was all along the line of road as far as Ogden in January 1869, after the alleged dissolution and before appellant acquired this paper, and never gave a hint utterance, look, nod, or wink or incited any one else to do so, to the effect that he had ceased to be a member, or that the firm had been dissolved.

3. Not only did appellee not do so, but no one else informed appellant or any one else that appellee had withdrawn from the firm or that any one else had withdrawn.

4. Appellant acquired this paper in suit supposing that the firm had the same composition, but still taking particular pains to inform himself in advance by inquiring specially of the cashier of the firm. Again, there was no change in the name of the business on the bank checks, where appellant would be liable to note a change inasmuch as the firm name on the bank checks was "James W. Davis and Associates," continously from June 22., 1868, till the end of the road was reached.

And, of course, to be of any avail, a notice of change must indicate *what* change—who retired and who remained. To merely proclaim a change is meaningless in legal contemplation: but *no* change was made, or known if made: and only vague hints were dropped, at times of getting rid of Sprague.

Again, if necessary, this Court and the Circuit Court as well, will take notice that while the Union Pacific Ry. was being built, to-wit, on July 25th 1868, the territory of Wyoming was detached from Dakota and that all these operations about ties were being conducted in Wyoming; and the Courts will further take judicial notice, that the Civil Code of Dakota enacted in the winter of 1865–6, and imported into Wyoming, by the Organic Act establishing that territory, and in force there when Appellee pretends he was not a partner and not liable; provided as follows: (Section 1316.) * * "A change of the partner-"ship name which PLAINLY INDICATES THE WITH-"DRAWAL OF A PARTNER, is sufficient notice of the "fact of such withdrawal to all persons TO WHOM IT IS "COMMUNICATED. But a change in the name WHICH "DOES NOT CONTAIN SUCH AN INDICATION IS NOT NOTICE "of the withdrawal of any partner." Hence, Appellee is bound, not alone by the common law of partnership liability, but by the express provisions of the local Statute law as well.

Owings vs. Hull 9 Pet. 625.

And it is to be noted that the averments of the Bill on this subject are as follows, viz: First that they (all the defendants) were, in fact, copartners, under the firm name, and style of James W. Davis and Associates.

Second: That they severally held themselves out to the world as being such, and that complainant acted on

the faith thereof, in the acquisition of said checks and drafts.

The Appellee has derived much satisfaction from the admission of appellant that, appellee always told him that he was not a member of James W. Davis and associates: but it must be recollected that this could not possibly have occured until after the suit in New York.

In Rec. p. 12, Rogers testifies: "I have never had notice of "any withdrawal of any member of the original firm of "James W. Davis & Associates, or any change in that firm, "until this suit in New York. During the operations of "James W. Davis and Associates, Durant was out there "once, and opened a lumber yard in Laramie City: he held "himself out to the world as a member of the firm of James "W. Davis and Associates. I never talked with him about "the indebtedness of the firm except in New York," &c.

Again, he says: (Rec. p. 16, 17,) "Durant was in "Wyoming in 1868. I talked with him a very little. There "seemed to be some trouble between Sprague and Davis: "and Durant was talking to me about it. The trouble "seemed to be mainly as to who should be boss, and that "was the leading part in the conversation; it was so long "ago that I don't recollect it. That is the only time I ever "saw him out West. * * Durant held himself "out to the world as a partner in James W. Davis & asso- "ciates in this way: the first time that I met him he was "introduced to me as one of the partners by Mr. Mattox. "He was only there for a short time, and took an interest "in the management. There was nothing else connected "with what Durant did that I know of."

Mr. W. F. Durant, himself, says: (Rec. p. 60.) "I "was out West * * once early in the Spring of

"1868, and the other time in December, 1868, or * *
"January, 1866."

"In the Spring I kind of opened a lumber yard and ar-
"ranged it. (p. 60.) (Rec. p. 61.) I don't remember now
"of ever seeing him (Rogers) until I met him in New York,
"but may have done so. I don't remember being introduced
"to him by Mattox in the Spring of 1868. I may have met
"him. (Rec. p. 62) I don't remember having any conver-
"sation with Rogers in the Spring of 1868, * *
"about any trouble between Davis and Sprague. I think I
"should remember if I had made such complaints to him.
"I never talked business with a stranger. (Rec. pp. 64 65.)
"I *may* have seen Rogers in the Spring of 1868, * *
"it is possible I was introduced to him."

It will be remembered that the defendant claims that there was no firm of James W. Davis & Associates till the Fall of 1868, so that Mr. Durant could not have told Rogers that he was not a member of *that* firm at his only interview in the *early Spring* of 1868. Neither party remembers any such conversation then, and Durant does not even remember any interview at all; hence the only opportunity that Mr. Durant had to deny his liability for Davis and Associates' debts was after the suit was brought in N. Y., and several months after Rogers had acquired the paper in suit; and Durant's disclaimer was thus too late, in point of time.

Inasmuch as the Court below was deceived very greatly thereby especial and marked attention is invited to one element of the defence and the fallacies which inhere therein. By reference to the first evidence of B. F. Bunker (on page 45.) and of H. C. Crane (on page 38.) it will appear plainly, that the papers and books of account of James W. Davis and Associates, and Davis Sprague & Co. were in the actual room in which the examination was being con-

ducted: and that Bunker had the key thereof, actually in his pocket. Yet he not only would not let the books of account be seen, but he also was apparently, perfectly stupid as a witness for appellant. But when Appellant's solicitor had returned to the West then Bunker's evidence and also Crane's was taken upon written interrogations: and the volubility and profundity of both the witnesses on all subjects connected with the whole tie contract is amazing; and not only these witnesses but several others seem eager to enlarge and swell out the record with all sorts of documents to attest the admitted facts, that Davis Sprague & Co. was a name under which operations were carried on prior to November 1868, and that James W. Davis and Associates was a name under which operations was carried on after November 1868. A golden key seems to have been produced to unlock these trunks to appellee which was wanting to appellant. But let these significant facts be noted: that the books of account which appellant avers were kept in name of James W. Davis and associates, and which appellee avers were kept in the name of Davis Sprague & Co. (which the Court below so found) DID NOT SEE THE LIGHT. Why was this? For the trunks were then unlocked.

Simply *because those books would have shown that they were kept from the very start in the name* of JAMES. W. DAVIS AND ASSOCIATES as the man who kept them testifies, and as appellant otherwise proves.

Van Tassell testifies (at p. 157.) that he drew his salary from "DAVIS SPRAGUE & CO" in 1869.

Lacy (their own witness) testifies; (at p. 153.) "I had "business with the firm of DAVIS SPRAGUE & CO. during "1867, 1868, and 1869.

The Referee in the New York Suit found and adjudged that "in the execution of said million tie contract all sub-"contracts for making or delivering ties, purchases of goods "merchandize and material, payments to employees for "labor, and receipts given for work, labor and materials were "made done and given, sometimes under the style of DAVIS "SPRAGUE & COMPANY and sometimes that of J. W. "DAVIS AND ASSOCIATES." (Record p. 204.)

And from one end of the voluminous Record to the other, is most ample proof that the entire operations under the furnishing the first million of ties and the first detachments of lumber and also under the subsequent operations were done and performed sometimes under one name and sometimes under the other, yet the Court below was deceived and betrayed into error of judgment by the sophistical and fallacious array of exhibits which of themselves proclaimed the undisputed sway of Davis, Sprague & Co., in 1867 and the first ten months of 1868, and the absolute dominion of James W. Davis and Associates thereafter, without at all, however, considering the possibility that Van Tassels receipts to DAVIS, SPRAGUE & CO., and LACEY'S BILLS of LADING and other documents of the same sort to that firm in 1869, were left in the trunks with the books of account and Bank Books of *James W. Davis and Associates* of 1867 & 1868.

Appellant *must* admit, for the whole proof establishes it, and does admit that *both names were used throughout*: he must admit for he cannot escape it or disprove it, that in the immense operations of that concern under a ~~real~~ dual name, many documents existed in both names: and that the custodian thereof, having the requisite *animus* could fish out a partial exhibit of documents which would make

up just such a sophistical exhibit as the Court below was imposed upon with; but why did not Bunker or T. C. Durant testify that THERE WERE NO DOCUMENTS in 1867, with James W. Davis and Associates thereon, that the bank checks were not signed by that name; that the books of account were not kept in that way: why did they not testify that nothing after 1868, bore the name of Davis Sprague & Co. Everything contained in all this mass of exhibits, is in perfect harmony with Appellant's theory of the case.

Again H. C. Crane dealt out the money which ultimately came to the contractors: or at least the evidence of these payments was at his command: the whole payment amounted to millions. The Appellant got the dull response from him (Rec. p. 39.) "I have paid drafts made "by Davis, either for himself or as Davis & Associates, or "something of the kind." etc. But sometime afterwards, Bunker opened the trunks, and the same Crane produces three drafts for an aggregate amount of $17.000. by Davis, Sprague & Co., in a contract for millions of dollars. The plain inference is, that Reed and Christopher were correct and truthful in testifying that all payments were made in name of James W. Davis and asssociates, (they should perhaps have added, except $17,000.)

Again: while the number of ties to be furnished under the contract was precise and defined, there were other elements in the contract which need attention (Record p. 178)

1st. The contractors were to cut timber to the extent of the capacity of the mill, for twelve months from December 3rd, 1867. They were also to deliver 600.000 feet of lumber at Dale Creek Bridge, and were to deliver an indefinite quantity of hewn timber. Now when were the con-

tracting parties released from these obligations? If they could stop furnishing ties when they had furnished just 1.000.000 would they not have to gain the assent of the railway company to release them from the timber contracts? These features of the contract seem to have escaped the attention of Mattox, when he was settling the whole of this vast contract with Evans, a sub-engineer under Reed.

Again, is it in the slightest degree probable—nay, is it within the range of moral probabilities; that two subordinate persons would get together and settle and adjust an immense contract without in some way attracting the attention of some one else in the whole world, about it. Yet Reed, the Cheif Engineer & Superintendent of construction knew nothing about it: nor yet did Christopher the Cashier and Bookkeeper: nor any of the Bankers: nor any of the Lawyers; nor any of the business men of the region where the enterprise was being carried forward; and who were furnishing ties under subcontracts: nor any one else in the whole universe, except—alas!—Mattox!

If Durant's witnesses are truthful, Davis seems to have indulged in considerable loose talk about making a change in the *personnel* of the tie contractors.

It would seem from the evidence that Sprague was disagreeable and that Davis wanted to get rid of him. Thus he informed Seymour, while sending him west to take charge of their interests, that Sprague would have nothing to do with the business. We also find him informing T. C. Durant that he would not have Sprague or Ruth, in the new management.

But we also find that T. C. Durant told Davis (Ans, to 10th Int.) that he would not make any new contract without responsible experienced men, evidently meaning

Sprague. (It seems that T. C. Durant had great faith in Sprague's executive abilities.) We also find that in the winter of 1869, Sprague declared that Davis was trying to make a seperate firm; (that was at least a year after it is pretended the new firm is established.) But we also find that after this, Sprague was in charge of the work at Bear River, the same as he had been under the "million tie" contract (ev. of R. S. Van Tassell, p. 127.)

From these and other circumstances, it seems probable that the only foundation there ever was for any supposition that there was a change of the *personnel* of the firm or firms, lay in Davis' desire to get rid of Sprague. It is manifest that he desired to accomplish this, and that he frequently talked of a change: having the ousting of Sprague in view as the change desired. It would appear, however, that T. C. Durant was opposed to this, and that Sprague remained in as superintendent of the work as before. Davis & Sprague remained in charge of the work to the end, and the other partners tacitly acquiesced in the continuance of the work, evidently supposing that money was being made thereby.

In addition to what is plainly made out, there are certain inferences which the judicial mind cannot hesitate to draw from this record; one is, that the partners themselves do not seem to have been desirous that the outside world should know who composed the partnership at any time; and accordingly in Cheyenne where the entire business and social life was, in some way allied to this tie contract, the people did not know who the partners were: also when creditors desired to sue they were at a loss what individuals to sue, but always one firm or the other. (Record pp. 154. 111.)

Appellant indeed was introduced to Appellee as one of the partners, and Appellee likewise disclosed his connection to some little extent by attending for a short time, to some of the business of the firm : but before Appellant who was also a banker for the firm and had been so for some time could safely discount their paper he was obliged to ask their cashier for specific information as to the personnel of the firm. (Record p. 61.)

Mattox testifies (Record p. 56) that Ruth claimed to be a partner of Davis and Associates, and Mattox, himself a partner had to write to Davis to ascertain; and Davis swears that Mattox never had any interest in the concern at all (Record p. 182.)

Mr. Woolworth testifies as follows in this suit (Record p. 152.) "It is a very hard question to answer, whether or "not, as a matter of fact Davis Sprague & Co. and James "W. Davis and associates were different names for precisely "the same firm and association of individuals and for the "same business. Many of the members of the two firms if "there were two, and of the one firm, if there was but one, "expressed contradictory opinions on the subject at differ- "ent times."

Another plain inference is, that some, at least, of the partners designed to claim, or disclaim, connection with the concern, accordingly as the venture proved successful or unsuccessful after the first million ties had been delivered; thus, appellee took no measures whatever, to sever his connection with the association after the first million ties had been delivered until (in the language of Bunker, Record pp. 81, 82.) it became "apparent that the million tie "contractors had made a large sum of money, and that "the work outside of that had been done at a great loss;"

then, September 26th, 1870, appellee, for the first time, took steps to push out from the losing concern. (Record p. 171.) It is in proof that before the million ties had all been delivered, he *said* he would go no further: but it appears from his acts that inasmuch as he found there had been a profit of $223.000. (Record p. 216.) he reconsidered his determination; for, when the million ties had been delivered, he *did not retire*, either as between himself and partners, and also as between himself and the world at large.

No single act of appellee can be shown, indicating any design on his part, to withdraw from the concern, except an empty declaration of his intention to do so, to James W. Davis and his brother; and it need scarcely be stated, that a private declaration of intention to withdraw, not followed up with a withdrawal in fact, is not certainly a withdrawal.

To the partnership itself, he should have demanded, either by, or without, judicial proceedings, a severance, and settlement; and to the general public he should have given notice, as required by the local statute, as well as by the weight of judicial authority.

With all deference to the opinion of the Circuit Court, it must be stated that the decision there, is predicated upon two palpable errors as follows;

1st. That the business of carrying out the delivery of the first million ties was made under the almost exclusive name of Davis, Sprague & Co.

2d. That when the first million ties were delivered, there was a total and radical change of name, which should have been notice to appellant that Durant had retired.

Neither of these conclusions of the Circuit Court, it is respectfully submitted, are, in the slightest degree or by any possibility of judicial inference, correct: but the opposite of both, are established conclusively.

The appellee presented a very elaborate and, so far as the facts admitted, ingenious argument in the Court below to sustain his theory of the case, but he utterly failed to explain or to overcome the following circumstances ; which remaining unexplained, leave, it is respectfully submitted, no doubt of the legal and moral liability of Appellee.

1. That the name of the firm was expressly stated, under the firm signature of James W. Davis and associates, in January 8, 1868, to be "*James W. Davis and associates*," in a grave document of importance, pertaining to the business of the firm.

2. That the muniment of title by which each partner held his interest was signed in the same name.

3. That their entire Bank accounts, from June 22, 1868, to the end of the road, were kept in the name of James W. Davis and associates, without break, settlement or notice of any change to the Bankers, or any one else.

4. That no settlement of the vast business of this partnership was made or attempted, until the entire completion of the delivery of ties and lumber.

5. That the entire outfits, sawmills, logging apparatus, cattle trains and camps of the firm, were in constant use, with no remonstrance, from the commencement to the end of supplying ties.

6. That M. B. Sprague, whom it is alleged, retired in Nov. 1868, kept right along in the active management of the business, without a days intermission, until the entire

road was tied; and never gave the least intimation to anybody that he had retired.

7. That the cashier and book-keeper of the firm; the lawyers of the firm; and the managing partners of the firm; and also the chief engineer of construction and disbursing agent of the R. R., did not at any time, know of the change.

8. That the business men with whom the concern did business, knew of no change and of no retirement of any member.

6. That Richards, Mattox, and Mrs. Train were not taken into the concern till twenty days after the alleged dissolution of partnership. (Rec. p. 202.)

10. That they paid Haygood, Kent, Rogers and Corlett, for liabilities of Davis, Sprague and Co., in checks of James W. Davis & Associates; and that they instructed their attorneys to defend suits against them by either name; and that no plea of mis-joinder, non-joinder, or misnomer, was ever entered.

11. That Durant was on the ground in 1869, and did not lisp to anybody that he had withdrawn or retired, and that no one else ever did so for him.

12. That Durant left his capital $30,000, profits, $67,000, property and credit in the concern, willingly and without objection, for two years after his alleged withdrawal.

13. That T. C. Durant his brother, who was constantly along the line of the road did not mention, or hint at his brother's withdrawal.

14. That not a single one of the six alleged retiring partners gave any notice of their withdrawal, till the road was completed.

15 That a firm consisting of eight persons, should assume the name of James W. Davis and Associates—then suddenly drop it—and when six of them withdrew, the remaining *two* should organize under the polynomial style of James W. Davis and ASSOCIATES.

16. That the ties which were supplied after one million had been delivered: were thus furnished at the west end of the line, by (as alleged,) James W. Davis and Associates, and that the sub-contracts therefor were made in July, August, September and October, 1868, by Bunker, before there was (as is stated by defendant) any such firm as James W. Davis and Associates.

17. And finally, that Mr. Rogers, who was entirely outside the concern, should be able to discriminate as to who were actually members of the firm, beyond what appearances indicated, when their lawyer, Woolworth, did not (altho' it was important for him to) know, and when it took a long, angry and bitterly contested law suit to decide between the partners themselves, who were partners and who were not.

These facts are unanswered and unanswerable; and being so, leave no escape from the conclusion, that appellee is legally liable to the complainant upon this paper.

Upon a review of the case it seems to be impregnable in law and equity: is it not equally so, in morals and good conscience?

The defendant joined in a great enterprise for the purpose of making a large amount of money: the successful carrying on of which, needed the good will, co-operation and assistance of laborers, contractors, merchants, bankers and business men, who lived in the neighborhood of the

operations of their vast enterprise. The plaintiff was a banker, and was frequently called on to render this enterprise, indispensable assistance. Thus we find him as a surety on their appeal bonds; and we especially find him appealed to, to release the Trustees of the U. P. Ry. from their imprisonment at "tie siding," by advancing money on their commercial paper, issued to pay the debts of this very firm which is in Court; in the course of taking this and other commercial paper, the plaintiff finds himself with a great mass of it dishonored on his hands. Surely the obligations to pay it is not only legal and equitable, but moral as well; and it is difficult to believe that a Court of equity can find in this record, and in the several unmeritorious technical defences urged by defendant, any technical rule which will "shove by justice" to this much harassed and long waiting suitor.

It is therefore respectfully asked that the Decree in the Court below may be reversed and a Decree directed in substantial accordance with the prayer of the Bill.

LEWIS L. COBURN,
HENRY C. WHITNEY,
Solicitors for Appellant.